

The University of Chicago

**THE WAIVER OF JURY TRIAL IN
CRIMINAL CASES IN OHIO**

**A PART OF A DISSERTATION SUBMITTED TO THE
FACULTY OF THE DIVISION OF THE SOCIAL
SCIENCES IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY**

**DEPARTMENT OF POLITICAL SCIENCE
1936**

**By
KENNETH JUSTUS MARTIN**

**THE JOHNS HOPKINS PRESS
BALTIMORE
1933**

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P R E F A C E

There is self-evident need of research concerning numerous phases of jury trial. One of the most striking and timely fields of endeavor appears to be an investigation of the results of the rapidly spreading practice of allowing the waiver of jury trial. Consequently the present study undertakes to present information concerning the results of waiver in felony cases in Ohio, a jurisdiction, which, like many others, has only recently adopted the practice.

The investigation, which was undertaken after the trial of important cases without a jury had focused attention upon the waiver of jury trial in Ohio, consists of an attitude study of the views of a large number of the bench and bar of the state relative to the desirability of waiver; and of a comparative statistical study of the use and results of non-jury trial in Ohio and Maryland during a two-year period. The basic data were made accessible through the facilities of the Institute of Law of The Johns Hopkins University, under whose auspices—in coöperation with the Judicial Council of Ohio—the study was made. The analysis and presentation of the material, however, is the responsibility of the writer, and should not in any way be considered an expression of the view of these bodies.

It must be remembered that the success of an investigation of this nature is due in no small measure to the contribution of the members of the bench and bar who provide information. This service is sincerely appreciated. The writer is also indebted to Miss Nettie Nulton and to Mr. Clark Morrow for their coöperation in the collection of data, and to Miss Mary Durbin and Mr. Lester Hunt for their aid in the preparation of the charts and the presentation of material. In particular, he wishes to acknowledge his deep sense of obligation to Dr. L. C. Marshall of the Institute of Law of The Johns Hopkins University for his encouragement and assistance in connection with the study.

KENNETH J. MARTIN



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CHAPTER I

INTRODUCTION

In recent years the desirability of allowing the waiver of jury trial in felony cases has become a question of national interest. A number of states, including Ohio, have changed their criminal procedure and given to the accused the right to waive a jury. This change is based upon the idea that a non-jury trial may be an advantage to both the accused and to society and that the defendant should have the opportunity to choose this form of trial if he so desires. Regardless of the correctness of this assumption, it is not too much to say that the rapid spread of the practice of allowing waiver constitutes one of the most important and far-reaching changes in criminal procedure which have taken place in the last century.¹

The increasing use of non-jury trials represents a trend in the administration of criminal justice which deserves careful consideration. It is a common practice to adopt new methods, but it is a very unusual thing to investigate the satisfactoriness of these methods in actual operation. The present study of the waiver of jury trial in Ohio represents an attempt to secure information concerning the actual results of waiver in a jurisdiction which has only recently adopted the practice.

The practice of waiving the jury in misdemeanor cases has long been in effect in Ohio. The right to waive a jury in minor offenses was decided by two early cases, *Dailey v. State* 4 Ohio State 57 (1854) and *Dillingham v. State* 5 Ohio State 280 (1855). These decisions, however, did not establish the right to waive a jury trial in a felony case; it was assumed that it was not possible under the constitution to waive jury trial in a major case.

The question of the right to waive a jury in a felony case, however, was brought before the Supreme Court of Ohio in the

¹ The practice previously followed throughout the nation, with the exception of four or five states, was to require all felony cases to be tried by a jury of twelve men. A jury of one's "peers" was esteemed the most satisfactory way of trying criminal cases.

case of *State, ex rel. Warner, v. Baer*, 103 Ohio State 585 (1921). The immediate issue of the case was the validity of a trial before a jury of eleven men, but the court considered the broad question "whether the right of trial by jury as guaranteed by sections 5 and 10 of the Bill-of-Rights could be waived" (in a felony case). The Supreme Court's decision was to the effect that, although the Constitution of Ohio conferred upon persons accused of crime a right of trial by jury before twelve men, this provision was not mandatory but a right of the accused which could be waived.

It may be assumed from the argument that the court meant that the entire jury might be waived as well as one juror.² The decision, however, was somewhat confusing, and, with the possible exception of one or two localities, it had little effect upon the waiver of jury trial. Ohio seemingly permitted waiver but did not practice it.

All doubt concerning the defendant's right to waive a jury trial was removed as a result of the revision and codification of the Ohio Code of Criminal Procedure in the year 1929. One important section of the new Code placed in statutory form the defendant's right to waive a jury trial in a felony case, and to have his case heard by the court.³ This legislative provision really marked the introduction into Ohio of the practice of allowing the waiver of jury trial in felony cases.

The desirability of an inquiry in regard to the results of the practice of allowing the waiver of the jury was brought out by the trial of an important murder case in the first year the law permitting waiver was in effect. This case, which was widely known as the *Tilby Smith* case, received a great deal

² The court expressly gave it this interpretation in later cases. *State of Ohio v. Habrig*, 106 Ohio State 151. *Marfield v. The Traction Co.*, 111 Ohio State 139. *Tari v. State of Ohio*, 117 Ohio State 481.

³ In all criminal cases pending in courts of record in this state, the defendant shall have the right to waive a trial by jury, and may, if he so elect, be tried by the court without a jury. Such waiver and election by a defendant, shall be in writing, signed by the defendant and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I _____, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury." Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial. (*General Code*, Sec. 13442-4)

of publicity and revealed some of the difficulties that might arise in connection with the practice. The defendant, Tilby Smith, who was charged with the murder of his wife, entered a plea of not-guilty by reason of insanity at the time the crime was committed and waived a jury trial. The Common Pleas Judge, Charles R. Sargent, refused to accept the waiver of jury trial by the accused.⁴ The case was tried by a jury and the defendant was found guilty of first degree murder. After the verdict, the action of the trial judge in refusing to allow the accused to waive a jury trial was carried to the Supreme Court of the state. This tribunal decided that under Ohio law the right to waive a jury was mandatory, and that it was not within the discretion of the trial judge to refuse to try a case in which the jury was waived. A new trial was granted the accused. The case was presented to the court without a jury and the decision was again "Guilty of Murder in the First Degree." No pardon was granted, and the defendant was electrocuted. The proceeding raised several questions concerning the desirability of allowing the waiver of jury trial.

The investigation is divided into two parts. The first aspect of the study, treated in Chapter II, consists of an investigation of the attitude of the judges, prosecutors, and attorneys of Ohio in regard to waiver. In order to secure this information, a comprehensive questionnaire, covering different aspects of the waiver of jury trial, was sent out by the Judicial Council of Ohio to those most closely in touch with the practice of allowing waiver.⁵ Nine questions for attorneys and eleven for judges and prosecutors were included, with appropriate subdivisions under each question.

The form was sent to 137 Common Pleas Judges, 88 prosecutors, and to 1327 attorneys throughout the entire state who

⁴ The refusal of the trial judge to allow the waiver of the jury was based largely upon the fact that he did not think the defendant mentally capable of understanding the significance of his action. Personal letter, dated February 8, 1932.

⁵ A preliminary study was made of the waiver of jury trial in Franklin county during the summer of 1931. Information was secured in regard to the facts of all the cases which went to trial in that county for six months time. The attorneys were interviewed in all cases in which the jury was waived and in an equal number of cases which were tried by a jury. Information was secured about the factors causing waiver, and other aspects of the practice. These case studies, combined with interviews with several judges and a careful examination of the material concerning the results of the waiver of jury trial in other jurisdictions, formed a basis for the larger study.

had acted as counsel in at least one criminal case during the first half of the year 1930. A total of 109 judges, 82 prosecutors, and 400 attorneys filled out the blanks.⁶ The returns thus reflect the views of practically all the judges and prosecutors of Ohio and of a large number of attorneys who have had a definite connection with trial work. The geographical distribution of the returns does not exactly follow, but is roughly proportional to, the distribution of population. At least two replies were received from each county in the state.⁷

It is unwarranted to assume that all those filling out the form have had actual experience with the waiver of jury trial and base their answers upon that experience. It is better to consider the returns as an attitude study of the views of a selected number of judges, prosecutors, and attorneys, most—but not all—of whom have had experience with the waiver of the jury.⁸ The replies can be accepted only as the convictions of individuals who are closely in touch with the administration of criminal justice.

In order to present the data effectively, the counties of the state are divided into two groups: one made up of the eight counties with large urban centers,⁹ and one made up of the remaining eighty counties of the state. To simplify terminology, we refer to the two groups as the urban and rural counties. The urban counties are Cuyahoga, Hamilton, Franklin, Lucas, Summit, Montgomery, Mahoning, and Stark. The eighty "rural" counties of the state are further divided in two sub-

⁶ A follow-up letter was sent to all judges and prosecutors. This accounts, in part, for the larger proportion of judges' and prosecutors' replies in comparison with that of the attorneys.

⁷ Fifty-two attorneys' blanks were returned, marked deceased, unknown, or unclaimed, while others stated that they did not feel qualified to reply. One judge was deceased, while three judges and one prosecutor did not fill out the blank because of lack of experience. The views of those who failed to reply are to a certain extent an unknown factor. It seems reasonable to assume that this group either had had less experience with waiver or were more indifferent concerning the practice than those who replied. A complete description of the source of the replies, by group and by jurisdiction, is presented in the Appendix.

⁸ If the survey were to be put off until all answers secured could be based on experience, it would be a matter of years before it could be carried out because of the small number of cases going to trial in the extremely rural counties. If, in the future, further investigation is made of the waiver of jury trial in Ohio, the present study will form a background for such study and be extremely valuable for comparative purposes.

⁹ These cities, which are given in the order of the counties listed above, are Cleveland, Cincinnati, Columbus, Toledo, Akron, Dayton, Youngstown, and Canton.

groups of approximately equal population. The twenty-three more densely populated counties make up the first sub-group, while the fifty-seven counties having the least density of population are included in the second sub-group.¹⁰ Finally, the distribution of replies is presented individually for a selected group of counties to test the possibility that the experience of certain localities has caused them greatly to favor or oppose the waiver of jury trial.

The second part of the study, treated in Chapter III, consists of a statistical investigation of the comparative use and results of non-jury trials in Ohio and Maryland during the two years 1930-1931. The data in regard to the waiver of jury trial were gathered as a part of the general investigation of the administration of criminal justice in Ohio and Maryland, which was being made by the Institute of Law of The Johns Hopkins University.

As a consequence of this two-fold investigation, information was secured in regard to the extent to which the jury is waived; the factors which cause the waiver of jury trial; the class of cases in which the jury is waived; the number of convictions and acquittals in jury and non-jury trials; and the general effect of this practice upon criminal procedure. In addition, the study assembles the views of competent observers with respect to the effects of the waiver of jury trial upon the criticism of the bench; the advantages and disadvantages of this practice to the state and to the accused; the possibility of changes which may result in improvement; and the desirability of allowing the waiver of jury trial.

¹⁰ The first group of 23 counties has a total population of 1,564,349 and a range of population density from 252.4 to 88.9. The counties, in order of density of population, are: Butler, Clark, Lorain, Jefferson, Trumbull, Belmont, Lake, Allen, Erie, Columbiana, Richland, Scioto, Miami, Tuscarawas, Marion, Muskingum, Lawrence, Sandusky, Ashtabula, Athens, Licking, Ottawa, and Fairfield.

The second group of 57 counties has a total population of 1,507,235 and a range of population density from 87.2 to 25.0. The counties, in order of density of population, are: Seneca, Crawford, Wayne, Wood, Portage, Guernsey, Greene, Perry, Hancock, Auglaize, Medina, Huron, Ross, Washington, Warren, Drake, Van Wert, Logan, Clermont, Ashland, Jackson, Shelby, Williams, Delaware, Hardin, Meigs, Fulton, Champaign, Knox, Defiance, Mercer, Pickaway, Henry, Preble, Clinton, Putnam, Coshocton, Gallia, Fayette, Hocking, Harrison, Wyandot, Highland, Union, Brown, Carroll, Monroe, Madison, Holmes, Noble, Adams, Geauga, Paulding, Morrow, Morgan, Pike, and Vinton. *Ohio Criminal Statistics* (Baltimore 1931), p. 64.

Perhaps the most significant information brought to light by the inquiry is the notable majority of judges, prosecutors, and attorneys who favor the practice of allowing the waiver of jury trial; and, on the other hand, the comparatively small extent to which the jury is waived in Ohio. The sections which follow present this situation and bring out other results of the investigation.

CHAPTER II

THE ATTITUDE OF THE BENCH AND BAR OF OHIO TOWARD WAIVER

I. THE DESIRABILITY OF THE WAIVER OF JURY TRIAL

The views of judges, prosecutors, and attorneys concerning the practice of allowing the waiver of jury trial in felony cases are important because these groups are most closely in touch with the administration of criminal justice. The three groups play distinct rôles in the trial of criminal cases; consequently, the opinion of each group has significance.

In order to determine the general attitude of those engaged in the administration of criminal justice relative to the desirability of allowing the waiver of jury trial, all three groups were given an opportunity to express their views in regard to the following question.

QUESTION I. DO YOU FAVOR A CONTINUANCE OF THE PRACTICE OF ALLOWING THE WAIVER OF JURY TRIAL IN FELONY CASES?

Please check one entry only.¹

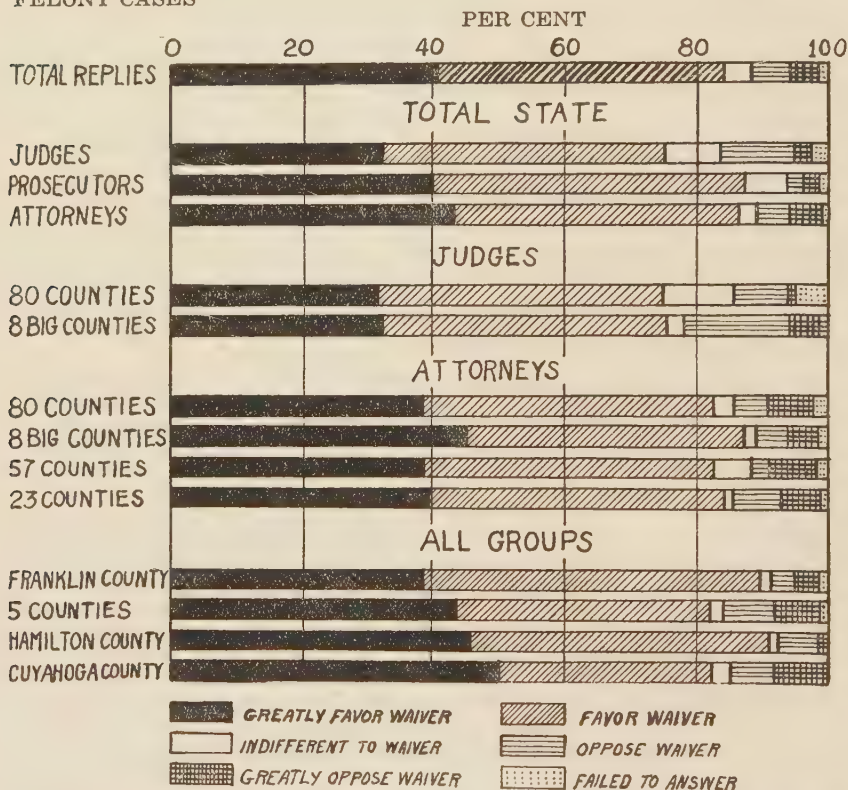
-1. I am greatly in favor of continuing the practice of allowing the waiver of jury trial.
-2. I favor the practice of allowing the waiver of jury trial.
-3. I am indifferent about the practice.
-4. I am opposed to the practice of allowing the waiver of jury trial.
-5. I am greatly opposed to the waiver of jury trial and I think the practice should be discontinued.

Please add such comments as you may wish to make.

The distribution of the replies is shown in Chart I. The top bar of the Chart reports the extent to which the total replies are in favor of or opposed to waiver. A large portion (40.6 per cent) *greatly* favor, and another large portion (43.6 per cent) favor the waiver of jury trial. At the other extreme a much smaller number of replies (4.6 per cent) *greatly* oppose, while

¹In the few instances in which more than one subdivision was checked the more extreme view was tallied.

CHART I.—PER CENT DISTRIBUTION OF THE REPLIES OF 109 JUDGES, 82 PROSECUTORS AND 400 ATTORNEYS OF OHIO, AS TO THE DESIRABILITY OF ALLOWING THE WAIVER OF JURY TRIAL IN FELONY CASES



In this chart, as in all others of its type, the base for each group, with one exception, is over 50. The base for the bar representing the judges of the 8 large counties is only 37, and the distribution is, accordingly, untrustworthy.

5.8 per cent oppose the waiver of jury trial. An even smaller number (4.1 per cent of the total) are indifferent about the practice. This leaves little doubt concerning the attitude toward waiver. A large proportion of all persons replying (84.2 per cent of the total) favor the practice of allowing the waiver of jury trial.

So much for an analysis of the total replies. The respective attitudes of the judges, prosecutors, and attorneys is a matter of even greater significance; and as among the groups, some interesting differences are shown. Thirty-two per cent of the

judges, as compared with 40.2 per cent of the prosecutors and 43.0 per cent of the attorneys, *greatly* favor the waiver of jury trial while an approximately equal proportion of all groups (around 44.0 per cent) favor waiver. The difference of 11.0 per cent between the judges *greatly* favoring waiver and the per cent of attorneys *greatly* favoring the practice is a noticeable one. The fact that the judges are least in favor of waiver is probably a natural result of the fact that they carry the burden of the practice. A considerable variation also exists among the three groups in the extent of opposition to waiver. Eleven per cent of the judges, as compared with 2.4 per cent of the prosecutors, and 5.0 per cent of the attorneys, oppose waiver while 2.8 per cent of the judges, 2.4 per cent of the prosecutors, and 5.5 per cent of the attorneys indicate that they *greatly* oppose the waiver of jury trial. On the basis of these data, it may be said that the judges favor the practice of allowing the waiver of jury trial least, the prosecutors favor it most, and the attorneys are in between.

The tendency of the prosecutors to favor the practice more than the other two groups indicates that they do not regard the waiver of jury trial a disadvantage to the interests of the state. It is surprising, however, that the percentage of attorneys opposed to the practice is twice as large as the percentage of prosecutors opposed. Since the right to waive a jury gives to the defendant and his attorney the opportunity to choose the type of trial, it would seem that this practice might be more favorably regarded by attorneys than by the other two groups.

The most significant thing is the large proportion in favor of waiver in comparison with those who oppose it. This is true of judges as well as prosecutors and attorneys. Three-fourths (75.2 per cent) of the judges, nearly nine-tenths of the prosecutors (87.8 per cent) and an approximately equal proportion of attorneys (86.0 per cent) are in favor of the waiver of jury trial. This practice clearly has the approval of a large percentage of the bench and bar of the state.

A comparison of the views of the judges of the eight large counties with the views of the judges of the rest of the state brings out that a larger proportion of the judges of the rural counties are indifferent concerning the waiver of jury trial. However, the percentage of judges in the urban counties who indicate that they are opposed, or *greatly* opposed, to the waiver of jury trial is twice as great as in the rural counties. These

data, let it be noted, should not be accepted without question because of the small number involved.

The attorneys' replies were numerous enough to make comparison much more reliable. A larger percentage of the attorneys of the eight large counties is in favor of allowing the waiver of jury trial than is true of the attorneys of the rest of the state. Conversely, the percentage of attorneys in the rural counties who are *greatly* opposed to waiver is greater than obtains for attorneys in the eight large counties. This, it will be remembered, is the reverse of the situation with the judges.

The bars of Chart I which refer to the fifty-seven most rural counties and the twenty-three more densely populated counties show little difference between these two groups of counties. The bars representing the eight large counties show that the percentage favoring or *greatly* favoring the waiver of jury trial is larger in Franklin County and Hamilton County than in Cuyahoga and the remaining five counties. In the same way, the proportion opposed or *greatly* opposed to waiver is larger in Cuyahoga and the five counties than in Hamilton and Franklin.²

The small number of replies from individual counties other than the eight large counties necessitates caution in interpretation. The returns show that nine counties, Scioto, Columbiana, Ashtabula, Lawrence, Allen, Erie, Licking, Ross, and Van Wert, are virtually unanimously in favor of allowing the waiver of jury trial. The replies from Ashtabula and Scioto counties are particularly interesting, for these two counties have had much experience with the waiver of jury trial. Scioto's experience with the waiver of jury trial is unique, inasmuch as it was a common practice long before the passage of the statute providing for waiver of the jury. Out of the ten replies from Scioto County eight *greatly* favor and two favor the practice of allowing the waiver of jury trial.³ In no in-

² Seven out of eight of the prosecutors of the large counties *greatly* favor waiver. The eight Cuyahoga and five Franklin County judges answering the form either favor or *greatly* favor the practice, while two of the eight Hamilton County judges and six of the sixteen judges of the other urban counties either oppose or *greatly* oppose the practice.

³ Mr. Edgar G. Millar, of Portsmouth, Ohio, the county seat of Scioto County, tells of the origin of the practice in that county: "To the best of my recollection, some years ago there were two second degree murder cases in this county in which the facts were fairly well known, and it was mainly a question of law as to whether the defendants were guilty of second degree murder or manslaughter and someone interested in the cases proposed that the cases be submitted to the Court and let him determine the degree of the

stance could a county be found which is entirely opposed to waiver. One large county, Mahoning, and three small counties, Lorain, Trumbull, and Williams, have the largest proportion (approximately one-third) of their replies opposed to waiver.

The comments which were made in addition to checking the form are of special significance because they may reasonably be considered as representing ideas to which the judge, prosecutor, or attorney wished to give particular stress.⁴ The comments, in part at least, also include ideas which could not be expressed by checking items on the form. No marked differences in regard to the first question seemed to exist among the remarks of the three groups.

COMMENTS IN FAVOR OF THE PRACTICE OF ALLOWING THE WAIVER OF THE JURY:

The waiver of the jury results in greater justice to the accused. A court trial saves both time and expense and has other procedural advantages. Trial without a jury tends to eliminate the escape of the guilty. The practice enables a more intelligent tribunal to pass upon the evidence. The right to waive a jury should cause greater care in the selection of judges and tend to bring about an abler judiciary. Waiver is frequently to the best interest of the accused for it enables him to escape popular prejudice and hostile newspaper publicity. Optional waiver does not jeopardize the rights of the accused. The courts are always fair. Waiver is an advanced step in dealing with crime which is in accord with progress. Jurors are not capable of performing the difficult task imposed upon them.

COMMENTS WHICH TEND TO QUALIFY THE WAIVER OF JURY TRIAL:

The accused should be given time to consider his legal rights. A defendant should have the advantage of counsel before waiving a jury. The state must not be permitted to check the waiver of jury trial. The judge should consent to the waiver of jury trial. The court should possess the right to have two judges sit with him in the trial of the case. The waiver of jury trial should not be allowed in a capital case. Waiver is desirable only as

crime. Judge James S. Thomas was on the bench and heard the cases and found both men guilty of manslaughter. From this the lawyers seemed to conclude that they could get fair trials from the Court, and ever since the larger proportion of our criminal cases have been submitted to the Court.

"The practice is working very satisfactory here and by far the greater proportion of all criminal cases in Scioto County are now submitted to the Court." Personal letter dated January 16, 1933.

⁴In order to make the additional comments more clear and more useful, they are included in summary form. The attempt is made to portray the range of ideas expressed, as well as list those most frequently mentioned. It is well to remember that the comments represent the statements of only a portion of those checking the form (in this instance, 20.1 per cent of the total), and, consequently, should not be allowed to outweigh the statistical data.

long as judges give indeterminate sentences and do not fix the minimum. The desirability of the device depends upon the caliber of the judges. Three judges should sit in all cases in which the jury is waived. This is a question for laymen and not for lawyers to settle.

COMMENTS OPPOSED TO THE WAIVER OF JURY TRIAL:

All persons should be treated alike and all criminal trials should be by jury. Waiver is a device which aids the criminal in escaping justice. Jury trial has important educational advantages for the public. No one individual should deprive another individual of his liberty. The time taken in a jury trial is inconsequential in comparison to the value of jury trial. The practice, although sugar-coated by being called a waiver, is but a means of taking away trial by jury from the accused. The defendant who insists on a jury trial is given a heavier penalty by some judges if he is found guilty. Waiver will tend to become the usual rule because of the fear of the ill will of the judge and prosecutors which exists when the accused demands a jury. The judicial system is linked with politics and as long as the judge's tenure of office depends upon election we should have jury trials in all felony cases. Because the jury has to a great extent cured the evils at which it was aimed we forget those evils and assume that they could not exist today. The jury protects the liberties of the individual and should not be altered. Waiver is a step in the wrong direction. After ten years' experience as a police judge in a court in which there are few jury trials, and four years' experience in a Common Pleas court where practically all cases are tried by jury, I believe the jury method of trial to be by far the better.

Although the number opposing the waiver of jury trial is small, their views are emphatically expressed and are worthy of careful consideration. As they see the situation, the jury is of such importance that it should be retained in all criminal cases. The time taken by a jury is inconsequential because of the small number of cases going to trial and the value of jury trial. Waiver is simply another means to bring about the curtailment of the jury. The comment that waiver creates a situation which tends to force the defendant to take a judge trial because of the fear of a greater penalty is a challenging statement. Pressure, exerted in a conscious or unconscious manner, can only be considered an evil. Finally, the view that the possible connection between an elected judiciary and politics makes jury trial desirable, and the idea that we fail to revere the jury because it has checked the evils at which it was aimed, require thought. We bring out the objections which are raised, but do not attempt to discuss their validity.

A brief summary may well be made. The replies in general indicate that:

1. A very large proportion of all groups (84.2 per cent) are in favor of the practice of allowing waiver.

2. The judges upon whom the burden of deciding the cases falls, are least, and the prosecutors most, inclined to favor the practice.

3. Little difference exists between the urban and rural sections of the state in their attitude toward waiver.

4. Noticeable differences exist among counties in their attitude toward waiver, but in no instance could a county be found that is entirely opposed to the practice.

5. Those who are opposed to waiver are strong defenders of trial by jury and seem to fear that waiver will lead to an unfortunate curtailment of the use of jury trials.

II. THE EFFECT OF WAIVER UPON THE CRITICISM OF THE BENCH

In recent years the administration of criminal justice has been a favorite object of criticism. The trial of an important case is given a vast amount of favorable and unfavorable publicity by newspapers; the attention of the general public is focused upon the courts. Since waiver of jury trial places the burden of deciding criminal cases directly upon the judge, the possibility exists that waiver will cause the displeasure of the public to fall upon the members of the bench.⁵ Question II was directed at this possibility.

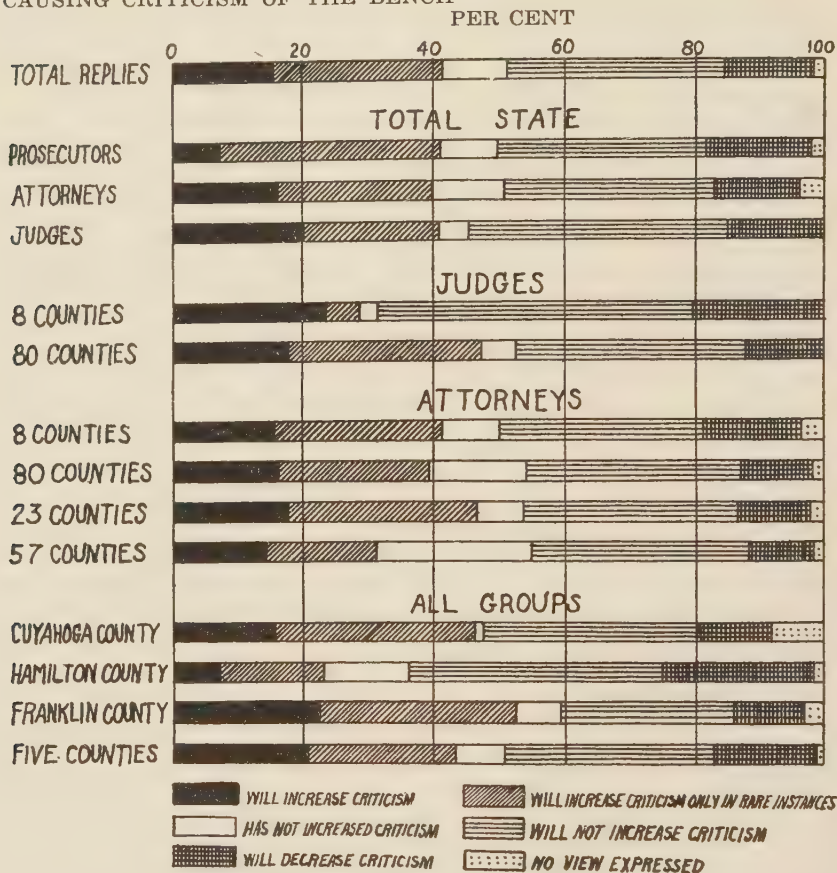
QUESTION II. DO YOU THINK THE RESPONSIBILITY OF TRYING IMPORTANT CASES WITHOUT A JURY WILL TEND TO INCREASE THE CRITICISM OF THE BENCH? *Please check one entry only.*

-1. I think there is serious danger of this practice increasing the criticism which is made of the bench.
-2. I think this practice will result in increasing the criticism of the bench only in rare instances.
-3. In theory it would seem that this practice would tend to increase the criticism of the bench but I do not think it does in practice.
-4. I do not think this practice will result in increasing the criticism to which the bench is subjected.
-5. I think this practice will result in decreasing the criticism which is made of the bench.

Please add such comments as you may wish to make.

⁵ The results of an important trial that occurred immediately preceding the making out of the form indicated the desirability of an inquiry as to the effect of waiver on the criticism of the bench. This case, which was

CHART II.—PER CENT DISTRIBUTION OF THE REPLIES OF 109 JUDGES, 82 PROSECUTORS AND 400 ATTORNEYS OF OHIO, AS TO THE EXTENT TO WHICH THE WAIVER OF JURY TRIAL RESULTS IN CAUSING CRITICISM OF THE BENCH



known as "the Thomas case," involved the trial of an important public official in Youngstown, Ohio on the charge of misconduct of his office. The dispute was political in nature and feeling was intense. The defendant waived a jury trial. The Chief Justice of the state appointed three outside judges to conduct the proceedings. The judges acquitted the defendant of the charges made against him and refused to remove him from office. The verdict resulted in a vast amount of criticism of the judges. Petitions were circulated throughout the community, urgently calling upon the Chief Justice of the Supreme Court to remove the three special judges. In addition, the members of the Grand Jury sent the Chief Justice a special letter, proposing that the judges be recalled. The Chief Justice replied at length to the effect that there was no basis on which to consider removal of the visiting judges, unless affidavit making specific charges of prejudice were filed against them and a hearing held. No action was taken and the judges were not removed.

If we glance at the top bar of Chart II, representing the total of all groups for the state, we find that nearly one-sixth (15.6 per cent) of the total think that there is serious danger of this practice increasing the criticism of the bench. On the other hand, nearly one-seventh (13.8 per cent) think this practice will decrease criticism of the bench. Here we have an approximately equal number holding the extreme opposites of view. Apparently the first group feel that the criticism which is now leveled at the jury will fall upon the judges if the jury is waived. The jury, it is felt, is a barrier which protects judges from criticism. The second group seems to feel that judges are blamed for unpopular decisions of jurors and that if the judges tried the cases themselves they would be less subject to criticism.

The larger proportion of replies reflects a less extreme view. One-fourth (25.4 per cent) think this practice will increase the criticism of the bench only in rare instances. One-tenth (9.7 per cent) reply that, although it would seem that waiver would increase the criticism of the bench, they do not think it does in practice. One-third (33.2 per cent) are of the opinion that waiver of jury trial will not result in increasing criticism. If we take these three middle groups together, we have two-thirds (68.3 per cent) of the total indicating that they do not think this practice will markedly affect the attitude toward the bench. If we combine the first two items into one group and the last three items into a second group, we have 41.0 per cent checking that this practice will increase the criticism of the court in some instances, and 56.7 per cent checking that this practice will not increase the criticism of the court. These percentages show that a majority of those replying do not feel that there is much danger of this practice becoming an evil by increasing criticism of the bench.

Chart II indicates that the judges are the most, and the prosecutors the least, inclined to think that there is serious danger of this practice increasing criticism. The proportion of judges (20.2 per cent) who believe that there is serious danger of this practice increasing criticism is greater than the proportion of attorneys, and three times as great as the proportion of prosecutors, holding this view. On the other hand, a slightly larger proportion of prosecutors than judges or attorneys feel that this practice will result in decreasing the criticism of the bench. The percentage of prosecutors who think this practice

will decrease criticism is greater than the percentage who think it will seriously increase it. The judges and attorneys hold the opposite view.

The judges and attorneys of the urban counties tend to check the more extreme views on the effects of waiver upon the criticism of the bench, while the rural judges and attorneys take a more moderate position. This is particularly true of the judges. The greater experience of the urban groups with waiver is probably the factor causing them to hold more decided views.

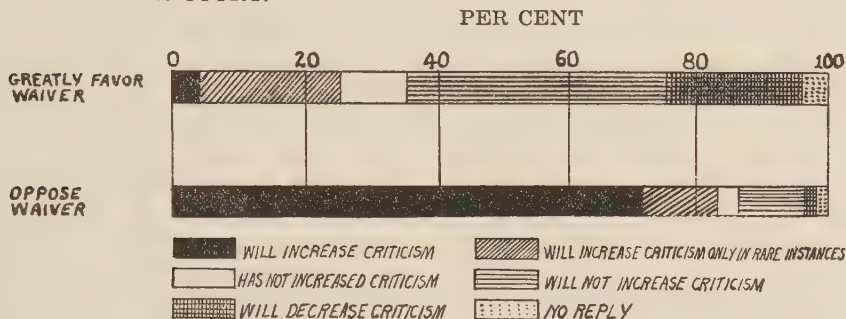
The attorneys of the twenty-three more densely populated rural counties seem to feel that there is more danger of this practice increasing criticism than do the attorneys of the fifty-seven less densely populated rural counties. This can be seen by comparing the combined length of the first two sections of the bars representing these groups. The attorneys of the less densely populated counties are much more inclined to indicate simply that the practice has not increased criticism.

The eight large counties show wide differences. The proportion of the replies from Cuyahoga, Franklin and the five counties who check that waiver will increase the criticism of the bench is much larger than the proportion of Hamilton County replies holding this view. More Hamilton County replies indicate that this practice has not increased criticism and will not tend to increase criticism. In addition, a much larger number of Hamilton County replies hold that this practice will decrease the criticism of the bench. The local situation must contain aspects which explain this difference.

The most striking difference in view relative to the effect of waiver upon the criticism of the court, however, exists between those who, in reply to Question I, indicated that they were opposed to waiver as compared with those who checked that they were *greatly* in favor of waiver. Chart II-A brings out a comparison between these two distinct groups.⁶ It will be noticed at once that an overwhelming majority (70.5 per cent)

⁶ This comparison may be somewhat confusing. The reader will recall that Question I of the preceding section dealt with the desirability of waiver. The replies to this question basically were divided into two main groups: (a) those who favored waiver; (b) those who were opposed to waiver. In order to secure information in regard to the views of those who *greatly* favored waiver as compared with those who opposed waiver the two groups were tallied separately for each question. This division was made because it was felt that the reasons for favoring or opposing waiver would, in part, be brought out by the answers to the remaining questions of the form. The comparison proved to be an interesting one; consequently the returns showing the contrast between the two groups are presented for each question.

CHART II-A.—COMPARISON, IN PERCENTAGES, OF THE EXTENT TO WHICH THOSE OPPOSED TO WAIVER AND THOSE WHO GREATLY FAVOR WAIVER THINK THE PRACTICE WILL INCREASE THE CRITICISM OF THE COURT.



of those opposed to waiver think that there is serious danger of its increasing the criticism of the bench. On the other hand, only a very small proportion (4.1 per cent) of those who *greatly* favor waiver think that it will increase criticism. At the other extreme, 19.7 per cent of those who *greatly* favor waiver state that this practice will decrease criticism, while only 1.6 per cent of those opposed to waiver check this item. A more striking difference of view could hardly be found.

A majority of the special comments are explanations of the reasons why it is felt that the waiver of jury trial will not cause additional criticism of the bench. The greatest number of comments that this practice will increase criticism come from the attorney group. The summary which follows provides a brief but comprehensive picture of the attitude of the three groups.⁷

THE SPECIAL COMMENTS OF THE JUDGES AS TO THE EFFECT OF WAIVER UPON THE CRITICISM OF THE BENCH.

The responsibility is one which the bench should be willing to assume. With optional waiver the defendant cannot complain. A judge should expect criticism. What if it does increase criticism—no harm can come of it. The courts are subject to criticism because of the leniency of jurors, and a judge who does his duty will be praised for such action. Waiver will remove criticism by reducing delay in criminal trials. Judge trial will lessen the technicalities of the law which cause dissatisfaction. Criticism would be obviated if the judge could pass on and veto waiver or have two other judges

⁷ Approximately one-fifth, (18.1 per cent) of the total replies comment relative to the effect of waiver upon the criticism of the bench.

sit with him. The judge is censured because of unfounded verdicts of jurors. The criticism of the bench will be increased only in cases in which an important section of the community has decided, without right, that the defendant is guilty. Waiver of jury trial will cause some criticism of the bench but it will instill confidence in the courts as a whole. If judges' decisions are wise they will be subject to no more criticism than in other court cases.

THE COMMENTS OF THE PROSECUTORS AND ATTORNEYS AS TO THE EFFECT OF WAIVER UPON THE CRITICISM OF THE BENCH.

There is plenty of criticism concerning juries—why not place the responsibility precisely? The judge gets the blame for jury verdicts which are based upon sentimentality and upon the failure of the jury to apply the law, given them by the judge, to the facts of the case. Some criticism will arise in cases in which the judge gives life imprisonment rather than the death penalty. If the judge is competent, able, and of unquestioned integrity, criticism will not arise. The prestige surrounding the bench is enhanced because the trial court has a double responsibility—weighing the facts and applying the law. The public is made more appreciative of the responsibility vested in the bench. The just decisions of the court will decrease criticism. Certain judges acquire a reputation for their fine decisions. The very case in which a jury may be a source of injustice will cause criticism of the court, but the court should be able to stand criticism and pressure. The practice will have a tendency to make the courts more courageous. The general public expect the judge to decide—not merely to preside. Criticism, if any, will be due to the lack of courage, ability and (or) impartiality of the particular judge only. A conscientious bar will be a bulwark to the fearless, fair and able judge, and will always stand against undeserved criticism.

If criticism were to increase it would be merited. Our courts have not been free of criticism of influence and this will add more opportunities. Only the most diligent care will keep the courts from imputed unfairness. Judges are not less free from prejudices, likelihood of error, and personal interest than jurors. The public will have more opportunity to believe the court influenced by special relation in a given case, or by money, if the decision does not suit them. The witnesses in criminal cases are taken from their usual employment, and if the judge acquits the court will be blamed. The possibility of elevation to membership of one unworthy is always present, and such an occurrence can easily bring discredit upon all others and incur general disrespect of courts and procedure.

The substance of these comments is that waiver will tend to increase criticism in certain ways and will decrease criticism in other ways. One significant statement brings out that the very case in which a jury may be a source of injustice will cause criticism of the court. The attitude also seems to exist that the criticism which would arise would, in part, be due to the lack of courage, ability, or impartiality of a particular judge

and might possibly be merited. On the other hand, it is contended that the waiver of jury trial will lessen the criticism which results from unfounded verdicts of juries, will reduce the criticism which is made of criminal procedure, and will enhance the prestige of the courts.

In general, the short time during which the waiver of jury trial has been in existence in Ohio makes the replies concerning its effect upon the criticism of the bench somewhat speculative in nature.

III. THE ADVISABILITY OF A CHECK UPON WAIVER

The question of the desirability of having some limitation upon the defendant's right to waive a jury was taken up in Question III, in the following form.

QUESTION III. WOULD YOU FAVOR A PROVISION TO THE EFFECT THAT IF THE JUDGE OR PROSECUTING ATTORNEY (THE STATE) OBJECTED, THE DEFENDANT COULD NOT WAIVE A JURY TRIAL AND HAVE HIS CASE HEARD BY THE COURT? *Please check one entry only.*

-1. I am very much in favor of a provision which would enable the state to object to the waiver of jury trial by the defendant.
-2. I favor a provision which would enable the state to object to the waiver of jury trial by the defendant.
-3. I do not think that it is necessary to have a provision allowing the state to object to the waiver of jury trial.
-4. I do not think that it is either necessary or desirable to have a provision allowing the state to object to the waiver of jury trial.
-5. I would favor a provision which allowed the judge but not the prosecutor to object to the waiver of jury trial by the defendant.

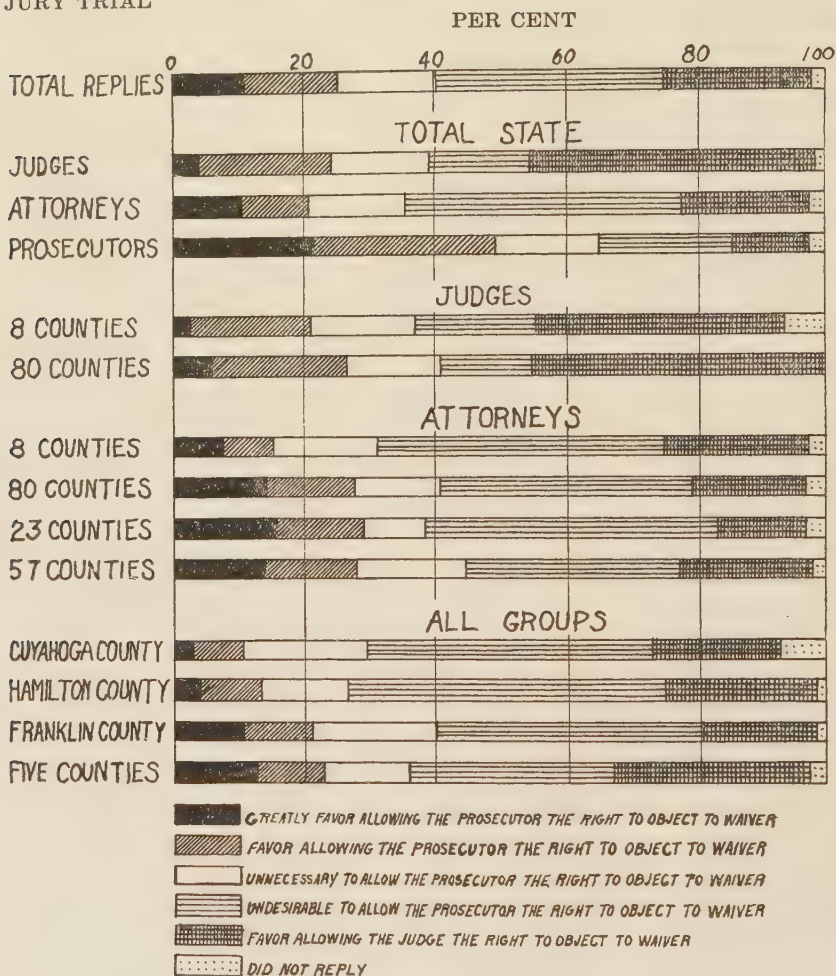
Please add such comments as you may wish to make.

The Supreme Court of Ohio in the case of *State v. Smith*, 123 Ohio State 237 (1931) held that according to the Ohio statute a trial by the court was mandatory if a defendant exercised his right to waive a jury trial. Previous to this statute the approval of the court presumably was necessary in order to waive a jury trial.⁸

⁸ The case of *State v. Baer*, *supra* p. 2, indicated that accused persons might, with the approval of the court, waive a jury trial.

The decision of *Patton v. United States*, 281 U. S. 276 (1930), which established a right to waive a jury in the Federal courts, implied that before any waiver could become effective the consent of government counsel and the

CHART III.—PER CENT DISTRIBUTION OF THE REPLIES OF 109 JUDGES, 82 PROSECUTORS AND 400 ATTORNEYS OF OHIO, ON THE ADVISABILITY OF A PROVISION ALLOWING THE JUDGE OR PROSECUTING ATTORNEY THE RIGHT TO OBJECT TO THE WAIVER OF JURY TRIAL



sanction of the court must be had, in addition to the express and intelligent consent of the defendant. The Illinois Supreme Court decided in the case of *People v. Scornavache*, 347 Ill. 403 (1931), that a defendant was not entitled to have his case tried by the court if the state's attorney objected to the waiver of jury trial. On the other hand, in Maryland, Connecticut, Wisconsin, and Michigan, waiver is the absolute right of the accused. The American Law Institute, *Code of Criminal Procedure*, Official Draft, p. 807.

The top bar of Chart III indicates that of the total replies for all groups one-tenth (11.0 per cent) are *greatly* in favor of a provision which would enable the state to object to the waiver of jury trial. An additional one-seventh (14.4 per cent) are in favor of such a provision. Thus, one-fourth (25.4 per cent) of all replies are in favor of granting to the state the right to object to waiver. The number, however, opposed to this provision is nearly twice as large as the number in favor of it. Nearly one-half (49.3 per cent) of the replies check that they do not think it necessary to allow the state the right to object to the waiver of jury trial. Two-thirds (34.2 per cent) of this group hold that granting to the state this right is not only unnecessary but undesirable as well.

The remaining fourth of the replies (22.8 per cent) favor a provision allowing the judge, but not the prosecutor, to object to waiver. The number in favor of granting this right to the judge is approximately equal to the number in favor of allowing the prosecutor this right. If these two groups are combined, we have 48.2 per cent of the replies in favor of some check upon the defendant's right to waive a jury in comparison with 49.3 per cent who are opposed to any check upon this right. A more equal division of view could hardly be obtained.

A wide divergence of opinion in the matter exists among the judges, prosecutors, and attorneys. Four and six-tenths per cent of the judges, 10.5 per cent of the attorneys, and 22.0 per cent of the prosecutors are *greatly* in favor of allowing the state the right to object to the waiver of jury trial. A somewhat larger number, 20.2 per cent of the judges, 10.0 per cent of the attorneys, and 28.0 per cent of the prosecutors favor such a provision. The total is significant. The percentage of prosecutors in favor of allowing the state to object to waiver is twice as large as the percentage of judges and attorneys favoring the practice. On the other hand, nearly one-half (43.1 per cent) of the judges, in comparison with 19.7 per cent of the attorneys and 11.0 per cent of the prosecutors, are in favor of granting to the trial judge the right to object to waiver. If we combine the totals for each group in favor of some check upon the defendant's right to waive a jury trial, we have 67.9 per cent of the judges, 61.0 per cent of the prosecutors, and 40.2 per cent of the attorneys favoring such limitation. In other words, nearly two-thirds of the judges and prosecutors favor some limitation on the waiver of jury trial, while a majority

of attorneys definitely oppose it. Although some variations in attitude appear when the replies from the various groups of counties are examined, these variations are not large. The state-wide average is fairly expressive of the situation.

A diversity in view exists between those who oppose waiver and those who *greatly* favor waiver. In general, a large proportion (67.2 per cent) of those opposed to waiver favor some limitation upon the defendant's right to waive a jury, while less than half (45.1 per cent) of those *greatly* favoring waiver hold this view.

The additional comments made by those checking the form are largely an expression of views why the judge or the prosecutor should have or should not have the right to object to the waiver of jury trial.⁹

COMMENTS IN FAVOR OF GIVING THE COURT THE RIGHT TO OBJECT TO THE WAIVER OF A JURY TRIAL.

The judge should have the same right as in a civil case. The court's discretion should be untrammelled. A case may have such attendant circumstances that a judge may wish to submit it to a jury. The judge may feel that he could impartially apply the law but that his knowledge of the facts and acquaintance with the parties make it undesirable for him to decide the facts. Circumstances in some cases might create criticism of unfairness. The judge should have this right to protect himself. He should be allowed to object in any case in which he is of the opinion that the waiver of the jury would result in unfavorable criticism of the court. The fact that the court is unwilling to accept the responsibility of the consideration of a criminal case without a jury would seem to indicate that his state of mind is such that he would be seriously handicapped in arriving at a just decision.

COMMENTS IN FAVOR OF GIVING THE STATE THE RIGHT TO OBJECT TO THE WAIVER OF JURY TRIAL.

The prosecutor, but not the judge, should be allowed to object to waiver. The state and the accused should have equal rights. In many instances the court is known to be opposed to capital punishment. Some judges, due to their previous practice, have a subconscious tendency in favor of the defense. A situation may exist in which the prosecutor has great cause to feel that the court will take into consideration friendship for defense attorneys to the detriment of the merits of the state's case. There would be less likelihood of collusion and less occasion for criticism. The state would never object to such a waiver unless for very strong reasons. In exceptional cases in some jurisdictions a jury in a particular case would be less influenced by politics which might react against the state. Some judges cleverly circumvent the

⁹ In this instance the comments represent the views of slightly over 17.0 per cent of the total replies.

operation of the prosecutor's office, for political reasons or otherwise, and consequently when assigned to the criminal court become the welcome object of attorneys who take advantage of the court's action. Occasionally a judge is elected who is not worthy of his office; society should have a safeguard by allowing the prosecutor to object. If all three parties cannot agree on waiver, a jury trial should be mandatory.

COMMENTS OPPOSED TO GIVING EITHER JUDGE OR PROSECUTOR THE RIGHT TO OBJECT TO THE WAIVER OF A JURY.

Neither the judge or prosecuting attorney should have the right to object to the defendant's waiver of jury trial. To permit the judge to object would only enable him to shirk his duty. The prosecutor has sufficient protection through his right to censor judge for prejudice. Since, historically and actually, a jury trial is a procedure designed for the protection of the rights of the accused, he alone should have the say as to whether he desires it or not. To allow the state or court to object when the accused is waiving a jury trial, possibly to escape prejudice or newspaper publicity, is unjust. The prosecutor is ambitious; he desires to show a high percentage of convictions; and would object for selfish or political purposes. The state might insist upon jury trial because of public opinion, and no defendant should suffer because of mistaken public opinion. To allow the prosecutor to object would be used as a means, on his part, to obtain convictions in cases, which if tried by the court would necessarily have to be decided in favor of the defendant. The right to object would be used as a weapon by the prosecutor. Such a provision would practically nullify this law. This right should be given free of restrictions or not at all.

To sum up, the returns do not show a decided view either in favor of or against some type of limitation upon the defendant's right to waive a jury trial. The proportion of the total replies which favors some limitation upon the defendant's right to waive a jury is exactly equal to the proportion which opposes such a provision. One-fourth of the total replies favor giving the state the right to object to the waiver of jury trial, another fourth favor giving the judge that privilege, while one-half of the replies oppose both provisions. A majority of the judges and prosecutors think some limitation should be placed upon the defendant's right to waive a jury, while a majority of attorneys definitely oppose limitation.

IV. THE EXTENT TO WHICH THREE JUDGES SHOULD BE USED

The practice of allowing the waiver of jury trial takes the burden of deciding important cases from twelve men and places it upon one man. The question arises whether it is too great a burden to require one man to pass upon the life or death of

another. In such cases, as well as in bank failure cases, political cases, and other trials in which the public is particularly interested, the use of three judges would reduce the responsibility placed upon one individual. This problem was taken up in Question IV.

QUESTION IV. WOULD YOU FAVOR A PROVISION GRANTING THE TRIAL JUDGE PERMISSION IN CASES INVOLVING LIFE IMPRISONMENT OR DEATH (OR OTHER MAJOR CASES) TO HAVE TWO OTHER JUDGES SIT WITH HIM TO HEAR THE EVIDENCE AND DECIDE THE CASE IF HE SO DESIRES? *Please check one entry only.*

-1. I favor such a provision.
-2. I favor such a provision in cases involving life imprisonment or the death penalty but not in other cases.
-3. I favor such a provision in cases involving the death penalty but not in other cases.
-4. I do not think such a provision is necessary.
-5. I do not favor such a provision.

Please add such comments as you may wish to make.

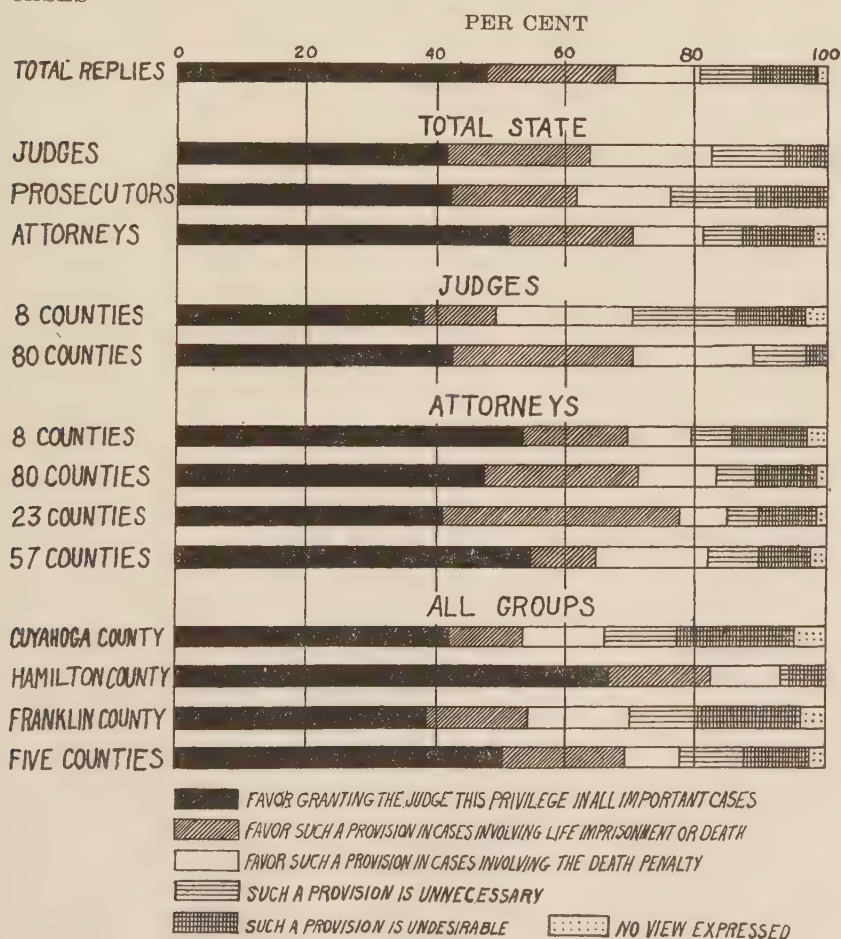
Chart IV portrays the distribution of the returns in regard to the desirability of allowing the trial judge the right to call in two additional judges in cases of major importance. Taking into account all replies, nearly one-half (47.7 per cent) either favor or *greatly* favor such a provision.¹⁰ In addition, 19.8 per cent favor granting the trial judge the right to call in other judges in cases which involve life imprisonment or death, while 12.9 per cent indicate that they favor such a provision in cases involving the death penalty. The vast majority of the total replies (80.4 per cent) are in favor of allowing the trial judge the right to call in other judges in certain cases. On the other hand, 8.3 per cent do not think such a provision is necessary, while an additional 10.0 per cent do not favor such a provision.

Turning now to the three special groups, it appears that the attorneys are willing to allow the judge to call in aid in a wider group of cases than are the judges or prosecutors. Fifty and six-tenths per cent of the attorneys, as compared with 41.5 per cent of the judges and prosecutors, favor giving the judge this privilege not only in cases involving life imprisonment or death, but also in other major cases. An almost equal percentage of each group, approximately 20.0 per cent, favors giving the

¹⁰ The question, as it was worded on the form, enabled those replying to indicate that they were *greatly* in favor of allowing the trial judge to have others serve with him in the trial of important cases.

judge the right to call in other judges in cases involving life imprisonment or death. The judges on the other hand, particularly stress the importance of having assistance in cases involving the death penalty. In general, more prosecutors

CHART IV.—PER CENT DISTRIBUTION OF THE REPLIES OF 109 JUDGES, 82 PROSECUTORS AND 400 ATTORNEYS OF OHIO, ON THE DESIRABILITY OF GRANTING TO THE TRIAL JUDGE THE PRIVILEGE OF HAVING TWO OTHER JUDGES SERVE WITH HIM IN IMPORTANT CASES



The base for each group, with one exception, is over 50. The base for the bar representing the judges of the 8 large counties is only 37, and the distribution is, accordingly, untrustworthy.

think that it is unnecessary or undesirable to grant the judge permission to have two other judges sit with him in the trial of cases than is true of either of the other groups. No explanation of this is available, for it would seem that the prosecutors would feel that a three-judge bench would be more likely to convict or give a heavier penalty in an important case than one judge.

The outstanding thing, however, about the replies to Question IV is the general willingness of all groups to allow the judge assistance in cases of major importance. Three-fourths of the prosecutors (75.6 per cent), four-fifths of the attorneys (80.7 per cent), and an even large proportion of the judges (82.6 per cent) are in favor of allowing the trial judge the right to have two other judges sit with him in cases involving the death penalty, while a large proportion of all three groups favor such a provision in other major cases. Apparently this proposal is one that has the approval of the bench and bar of the state.

An examination of the bars representing the replies of the judges and attorneys of the eight urban and the eighty rural counties brings out that a larger proportion of the rural judges and attorneys is in favor of allowing the trial judge the right to have two other judges serve with him in important cases. A considerable variation exists between the twenty-three more densely populated counties and the fifty-seven rural counties on the question whether the judge should have this right in all important cases, in those involving life imprisonment or death, or only in cases involving the death penalty.

As for the eight large counties, a greater proportion of Cuyahoga and Franklin County replies is opposed to allowing the trial judge assistance than is true of the other large counties, and the state as well. Again, Hamilton County holds a different position. Over nine-tenths of all Hamilton County replies favor granting to the trial judge assistance in cases involving the death penalty, and nearly two-thirds favor granting this right in all important cases.

Approximately nine-tenths (86.9 per cent) of those who *greatly* favor the waiver of jury trial also favor granting the trial judge the right to have others serve with him if he so desires. Those who are opposed to waiver are much less inclined to favor a practice which would result in a three-judge bench in important cases. Over one-third (37.7 per cent) of

those opposed to waiver do not think it desirable to allow the trial judge the right to call in other judges. The views of those who do not favor this provision would seem to be that it is far more advisable that the jury be used in all cases.

The added comments made by those checking the form again possess considerable interest. In particular, the suggestions that either the defense attorney or prosecutor, on motion, should have the right to request other judges if the court does not, and that the additional judges should hear and decide the case and not merely sit in an advisory capacity deserve attention.¹¹

VIEWS IN FAVOR OF GRANTING THE JUDGE SPECIAL ASSISTANCE.

There are cases in which the judge wishes assistance. Fairness to the judge demands the passing by the Legislature of such an amendment applicable at least to crimes which may be punishable by death. It would relieve the court of a grave responsibility and a tremendous burden. A case involving the death penalty should not be determined by the judgment of one individual. One who has not gone through such an experience cannot appreciate the tremendous strain involved by a waiver of jury in a first degree murder case. Where judges rotate it permits the judge to call older and more experienced jurists to his assistance. The judges could deliberate the case and exchange views and size up the case from different angles.

Such a provision would add to the fairness of trial and tend to discourage expensive appeals. It would offset any prejudice of the local judge. In time of great public excitement it would permit a judge to do justice and avoid public wrath. It would give moral support to those judges who need it. The possibility of a three-judge bench would prevent the use of waiver in those cases where the defendant thought the particular judge was timid or susceptible to influence. Such a statute would result in a more thorough decision and create public confidence. It would minimize the idea of favoritism. It would give a firmness to judicial determination which would prevent criticism. It would increase the dignity of the bench.

Special assistance would only be needed in extreme cases. It should be granted by the Chief Justice only. Three judges should sit in all capital cases in which the jury is waived. Either the defense attorney or prosecutor, on motion, should have the right to request other judges, if the court does not. It should be provided that all the judges should hear and decide the case and the two should not sit in an advisory capacity. Three judges should be mandatory in cases where a trial by jury is waived by the defendant. A unanimous vote should not be required for the verdict. All three judges should be required to concur.

¹¹ One out of every seven of those replying to Question IV express their views in writing in addition to checking the form.

VIEWS OPPOSED TO GRANTING THE JUDGE SPECIAL ASSISTANCE.

If a judge has not the stamina to hear all cases that properly come to him, regardless of the degree of punishment, he has no business on the bench. If he has an interest or bias in such a case, however remote, he knows it and should vacate the bench *sua sponte*. Experience has shown that one judge is satisfactory. A committee seldom decides as well as an individual. It would slow up the dockets and delay trial work. If the three judges did not agree unanimously, it would cause discontent.

It is evident that an overwhelming proportion of the total replies favor a provision granting the trial judge permission to have other judges sit with him in cases involving the death penalty, or in other major cases. The statement of the trial judge who found the defendant guilty of first degree murder in the famous *Tilby Smith* case vividly presents the desirability of such a provision.¹² "I do not believe that it is right to require one man to pass upon the question of life or death for another. No one who has not passed through the experience can appreciate the tremendous strain involved by a waiver of the jury in a first degree murder case. Fairness to the judge demands the passing by the legislature of such an amendment applicable at least to crimes which may be punishable by death." The vast majority in favor of this provision indicates that it deserves careful consideration.¹³

¹² *Supra*, page 3.

¹³ The wisdom of this practice has been indicated by two notable cases which recently were tried in Ohio.

The first of these cases, known as "the Bischoff case," arose out of the brutal murder of a young girl. The defendant pleaded insanity and waived a jury trial. The public was insistent that the crime be avenged. Five Common Pleas judges sat in the case. The trial involved the most searching examination of the legal and mental tests of insanity. The judges decreed that a hearing must first be held as to the ability of the defendant to know right from wrong. A vast amount of testimony was brought forward to show that the defendant was hopelessly insane. The use of a five-judge bench greatly strengthened the confidence of the community in the decision and saved a defendant who was totally incompetent from a trial which probably would have resulted in the death penalty.

The second case, known as the "Maschke case," was tried by a bench of three judges. The proceeding involved a number of important political figures in Cleveland, who were charged with the embezzlement of a large amount of money from the county treasury. After great difficulties were encountered in the attempt to secure a jury, the case was tried by the court. The tremendous interest in the proceeding, and its great significance, made it seem imperative that more than one judge should sit.

The popular approval of the waiver of jury trial in these cases rested largely upon the use of a bench of judges.

V. THE FACTORS WHICH CAUSE THE WAIVER OF JURY TRIAL

It is, of course, of particular interest to ascertain the factors which cause the waiver of jury trial and the type of case in which the jury is waived. Questions V-A and V-B deal with this situation. It will be noticed that the judges, prosecutors, and attorneys who answered these questions were instructed to check as many entries as they wished. Any factor checked by one-third of those replying may be considered as having fairly wide acceptance. Any factor checked by one-half of those replying may be considered as having quite wide acceptance.

QUESTION V-A. WHAT ARE THE FACTORS WHICH TEND TO CAUSE THE WAIVER OF JURY TRIAL? *Please check as many entries as you wish.*

-1. The attitude of the particular attorney who has the case toward the desirability of trying cases before a jury or before a judge.
-2. The make-up and caliber of the jury panel.
-3. The reputation of the judge and his personality and disposition.
-4. The fear of popular prejudice upon the jury.
-5. The fear that a jury trial will magnify the offense.
-6. The hope that the sentence will be shorter if the case is tried to the court.
-7. The belief that a single judge will be less likely to inflict the death penalty in a first degree murder case than a jury.
-8. The desire to avoid the uncertainty of the action of the jury.
-9. The desire to submit evidence favorable to the accused which may influence the sentence without securing the disfavor which might result from putting the state to the expense of a jury trial.
-10. The attorney appointed by the court desires to save himself the time and bother required by a jury trial so he recommends a judge trial.

If other factors exist, please state them.

QUESTION V-B. IN WHAT CLASS OF CASES IS THE JURY TRIAL MOST GENERALLY WAIVED? *Please check as many entries as you wish.*

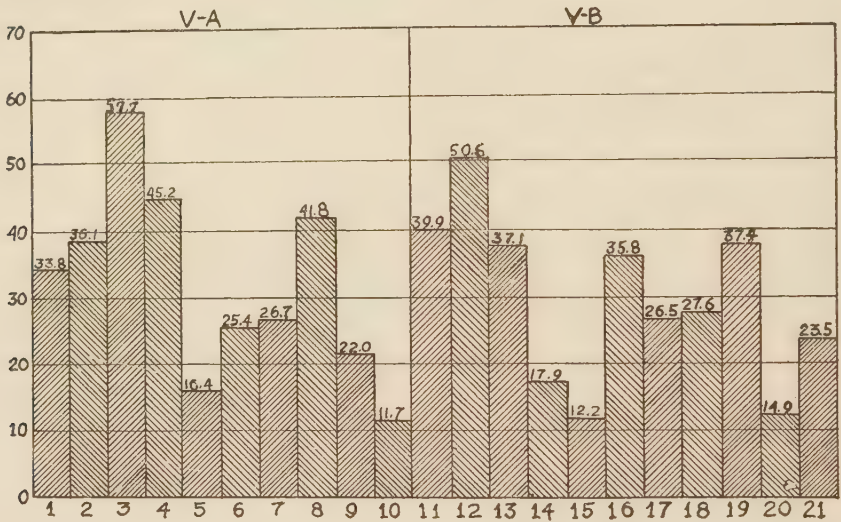
-11. In cases where the defendant is innocent or has a strong case while the state has a weak one.
-12. In the trial of crimes which have aroused community anger.
-13. In the trial of cases in which there has been considerable newspaper comment.
-14. In cases in which the defendant is of the Negro race.
-15. In cases in which the defendant is foreign born.
-16. In cases involving sex offenses or other revolting crimes.
-17. In cases in which the defendant has a known bad record.
-18. In cases in which the attorney feels the accused is guilty but the accused refuses to plead guilty.

-19. In cases in which the accused is seeking the advantage of a technical legal defense.
-20. In cases in which the evidence is long and complicated.
-21. In cases in which the accused or his attorney are friendly with the judge, or hope to bring political pressure to bear.

If other classes exist, please name them.

CHART V.—PER CENT DISTRIBUTION OF THE TOTAL REPLIES OF 109 JUDGES, 82 PROSECUTORS AND 400 ATTORNEYS OF OHIO, ON THE FACTORS WHICH CAUSE THE WAIVER OF JURY TRIAL AND THE CLASS OF CASES IN WHICH TRIAL BY JURY IS MOST GENERALLY WAIVED

PER CENT



The bars of Chart V represent the twenty-one subdivisions of Questions V-A and V-B. The numbers below each bar correspond to the items of Questions V-A and V-B. The exact meaning of each bar can easily be determined by referring back to the question.

The per cent at the top of each bar represents the proportion of the 591 replies which checked the item.

A glance at Chart V shows that certain factors stand out as reasons for the waiver of jury trial. If these factors are arranged in the order of frequency of mention, one finds that the reputation of the judge and his personality and disposition ranks first with a 57.7 per cent vote. The fear of the effect of popular prejudice upon the jury (45.2 per cent) and the desire to avoid the uncertainty of the jury (41.8 per cent) rank next. The makeup and caliber of the jury panel (36.1 per cent) and

the attitude of the individual attorney toward the desirability of trying cases before a jury or judge (33.8 per cent) are considered factors of significance.¹⁴ The belief that a single judge will be less likely to inflict the death penalty than a jury (26.7 per cent), the hope that the sentence will be shorter if the case is tried to the court (25.4 per cent), and the desire to submit evidence favorable to the accused which may influence the sentence without securing the disfavor which might result from the putting the state to the expense of a jury trial (22.0 per cent) receive about an equal number of votes. A much smaller number (16.4 per cent) check as a factor the fear that a jury trial will magnify the offense. Finally, least in size of vote, but not the least interesting, 11.7 per cent believe that the attorney appointed by the court desires to save himself the time and bother required by a jury trial so he recommends a judge trial.¹⁵

Turning now to question V-B, which asks in what class of cases the jury is most frequently waived, we find that one-half (50.6 per cent) of the total replies check that the jury is waived in the trial of cases which have aroused community anger. Two other factors, the jury is waived in cases in which there has been considerable newspaper comment (37.1 per cent) and in cases involving sex offenses or other revolting crimes (35.8 per cent), seem approximately equal in importance. The feeling apparently exists that the judge will be less influenced by these factors.

A somewhat larger percentage indicates that the jury is waived in cases in which the defendant is innocent or has a strong case while the state has a weak one (39.9 per cent), and in cases in which the defendant is seeking the advantage of a technical legal defense (37.4 per cent). A number comment thus: "If the defendant is innocent, try it before a judge; if

¹⁴ In Baltimore, where jury trial is waived in a large proportion of all felony cases, certain lawyers repeatedly request a jury trial and are known as jury lawyers; other lawyers almost invariably take a court trial and are known as court lawyers. Information obtained from court clerk, Criminal Court No. 2, Baltimore, Maryland.

¹⁵ The number who check that the attorney appointed by the court recommends a judge trial because he desires to save himself the time and bother of a judge trial deserves attention. A recent study of the waiver of jury trial in Detroit shows that the jury is waived in a much larger per cent of cases where the accused is defended by an appointed attorney than when he has his own attorney. Goldberg, W. Abraham, "Optional Waiver of Jury in Felony Trials in Recorder's Court, Detroit Michigan," *Journal of Criminal Law and Criminology*, vol. XXI, p. 41.

guilty, try it before a jury." Others stress that it is more satisfactory to try a technical case before a judge. That the jury is waived in cases in which the attorney feels the accused is guilty but refuses to plead guilty is believed by 27.6 per cent of those replying; and in cases in which the defendant has a known bad record by 26.5 per cent. The next most frequently assigned cause for waiver, checked by a surprisingly large proportion (23.5 per cent), deals with the relation between the attorney and the trial judge. The jury is waived, it is alleged, in cases in which the accused, or his attorney, is friendly with the judge, or hopes to bring political pressure to bear. It is possible that a portion of those checking this item refer only to the mutual respect which a good attorney and able judge might feel toward each other. If, however, waiver takes place with the expectation of friendliness resulting in favoritism, or because of the possibility of political pressure, the practice cannot be too harshly condemned. The large number checking this factor is certainly an interesting phenomenon.

Two of the three remaining reasons for waiver deal with the race and nationality of the defendant. Only a small proportion (17.9 per cent) hold that the jury is waived in cases in which the defendant is of the Negro race. An even smaller percentage (12.2 per cent) reply that the jury is waived if the defendant is of foreign nationality. These factors, then, are not considered to be of great importance. Finally, 14.9 per cent indicate that the jury is waived in cases in which the evidence is long and complicated.

The views of the judges, prosecutors, and attorneys toward the factors causing the waiver of jury trial and the class of cases in which the jury is waived, are, upon the whole, marked by greater likeness than difference. True, half of the judges, as compared with less than one-third of the prosecutors and attorneys, stress the importance of the attitude of the individual attorney as a factor causing waiver of the jury; the make-up and caliber of the jury panel is checked by twice as large a percentage of attorneys as judges; the fear of popular prejudice upon the jury is considered of far greater importance by the attorneys and prosecutors than by the judges. Then too, one-third of the judges, as compared with one-fourth of the attorneys, believe the possibility that a single judge will be less likely to inflict the death penalty is an important factor in causing waiver. The desire to submit evidence favorable to the

accused, which may influence the sentence without securing the disfavor which might result from putting the state to the expense of a jury trial, is considered of greater importance by attorneys than by judges. With respect to the other factors, however, no marked difference exists as among the three groups.

The differences expressed by the urban and rural judges must be used with caution, because of the small number of persons involved. The rural judges emphasize the fear of popular prejudice upon the jury, and the desire to avoid the uncertainty of a jury; the urban judges stress the reputation of the judge, the attitude of the individual attorney and the belief that the attorney appointed by the court recommends a judge trial because he desires to save himself time and bother. No difference worth commenting upon exists between the attorneys of urban and rural counties. Similarly, the differences which exist on a jurisdictional basis in regard to the class of cases in which a jury is most frequently waived are relatively inconsequential.

The "big eight" counties vary considerably in their judgment concerning the factors which cause waiver. The replies from Hamilton County stress the make-up and caliber of the jury, the fear of popular prejudice upon the jury, and the desire to avoid the uncertainty of the jury. Franklin County has the largest number checking that the jury is waived because of the hope that the sentence will be shorter if the case is tried by the judge and because the attorney appointed by the court desires to save himself time and bother, while an exceptionally large number of Cuyahoga County replies (33.8 per cent) indicate that the jury is waived in cases in which the accused or his attorney are friendly with the judge, or hope to bring political pressure to bear.

When the replies are sorted according to whether the person replying favors or disfavors waiver, a sharp contrast is found to exist between those opposed to waiver and those who *greatly* favor waiver. Those favoring waiver hold the view that the fear of popular prejudice upon the jury, and the desire to avoid the uncertainty of the jury are the important factors causing waiver. Likewise, this group indicates that the jury is waived in cases where the defendant is innocent, in cases which have aroused community anger, and in cases in which prejudice is likely to be a factor. On the other hand, a large proportion of those opposed to waiver check that the jury is most frequently

waived in cases in which the accused, or his attorney, is friendly with the judge or hopes to bring political pressure to bear; and in cases in which the attorney appointed by the court desires to save himself the time and bother required by a jury trial.

In general, the comments of the three groups tend merely to emphasize the factors listed on the form rather than to bring out new factors.¹⁶ The significance of the trial judge is brought out forcefully in the following statement. "It seems to me that the reputation, character and personality of the judge would be the determining factor. The committee can easily call to mind Ohio judges, and especially judges on the Federal Bench in Ohio, before whom the waiver of jury trial would mean pleading guilty. There are other judges whose good nature would be imposed on."

COMMENTS ON THE FACTORS WHICH CAUSE THE WAIVER OF JURY TRIAL.

The desire to have a more competent and impartial tribunal pass upon the facts, and the desire to use the training and experience of the trial judge in disposing of the case to the best interests of the accused are important factors in causing the waiver of the jury. A judge will be more likely to disregard matters unfavorable to the accused which do not affect the merits of the case. The defendant believes that if he waives a jury trial and places the responsibility upon the judge it will affect his sympathies and tend to lessen the penalty. Waiver of jury trial cuts the red tape and makes possible better coöperation with the judge in a case where the sentence should be suspended and the accused put on probation. The jury is waived because of the desire to escape the wrath of an overworked judge who seeks to escape being bored by long trials. The only way to get probation before some judges in case of doubt as to the accused's guilt is to have a court trial. Jurors see more of the prosecutor and favor him. The jury is waived in order to avoid trial before a jury which is case hardened or labors under the false impression that the defendant must have committed some crime or he would not have been arrested and indicted.

THE COMMENTS IN REGARD TO THE CLASS OF CASES IN WHICH THE JURY IS WAIVED.

Waiver takes place in cases in which the accused is innocent or has a valid defense. A court trial is used where there are mitigating circumstances which would tend to reduce the importance of the crime but which cannot be introduced under strict rules of evidence before a jury, yet which might be admitted by a judge without a jury, and in cases where the defendant

¹⁶ One out of every six comment on the factors which cause the waiver of jury trial; one-twelfth express additional views as to the class of cases in which the jury is waived.

believes the jury will convict because of his bad record rather than from the testimony and evidence. The attorney desires a non-jury trial in cases in which there is a widespread prejudice involving the point in question or in which there is considerable local prejudice against the people involved, and where the defendant is not presentable because of savage look or harsh speech. A court trial is considered advisable in cases which involve only questions of law as distinguished from questions of fact; in capital cases involving the degree of guilt; and in complicated cases where it would be difficult for a jury to carry features of the case in mind. In insanity cases, the attorney for the accused feels that the technical expressions of the mental experts will be more readily understood and receive fuller consideration at the hands of a judge than of an average jury.

Although the waiver of jury trial has existed for some time in our county (Scioto) I doubt if this practice has prevailed in one class of cases to a greater extent than in others.

In addition to the above, an interesting contrast of view is expressed in regard to the validity and significance of the statement that the jury is waived in cases in which the accused, or his attorney, is friendly with the judge or hopes to bring political pressure to bear. One attorney comments, "Note that I double-check this factor." Another writes, "This statement is illustrative of a more or less popular misconception of judges and attorneys. I have yet to encounter an attorney who even spoke of using improper influence on the court. . . . I believe such cases are existent more in the minds of prejudiced persons than in actual fact."

VI. THE REASONS WHY JURY TRIAL IS NOT WAIVED IN OHIO

The factors which cause the jury to be used are as important as the reasons why the jury is waived. In comparison with other jurisdictions, the right to waive a jury is used infrequently in Ohio, not only in the rural districts but in the urban sections as well. The question which follows attempts to determine why the jury is not waived in a larger number of cases which go to trial in Ohio.¹⁷

¹⁷ The question as it is presented suffers from the fact that it attempts to serve two purposes at one time. It attempts to present both the factors which cause the use of trial by jury, and the benefits of jury trial. It was assumed that if these two aspects were combined they would show the reasons why trial by jury is not waived. A certain number of the replies brought out that while the last items in the question, particularly the last three, are true, they are not reasons which would keep a trial lawyer from waiving a jury. The replies, then, show reasons why the jury is not waived, but should not be used as a reliable indication of the attitude of the bench and bar of the state concerning the desirability of jury trial.

QUESTION VI. WHY IS THE JURY NOT WAIVED IN A LARGER NUMBER OF FELONY CASES WHICH GO TO TRIAL IN OHIO?

Please check as many entries as you wish.

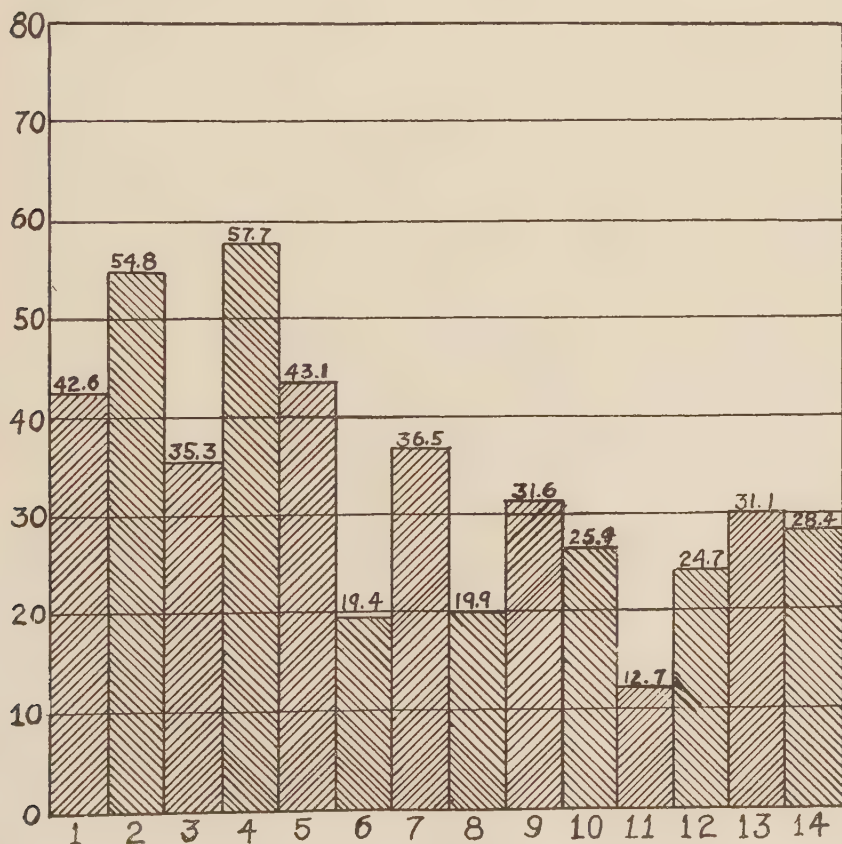
- ☐1. The jury is used because it affords the defendant a better means of escaping justice.
- ☐2. The jury is used because jury trial gives attorneys more opportunity to influence the verdict by stressing immaterial factors and by making emotional appeals to the sympathy and prejudice of jurors.
- ☐3. The jury is used because it is felt that a jury trial increases the possibility of securing an appeal and reversal through error in the admission of evidence.
- ☐4. The jury is used because of the possibility of one or two jurors disagreeing and thus preventing a conviction.
- ☐5. The jury is used because it is easier to deceive laymen in regard to the facts of the case than it is the trial judge.
- ☐6. The jury is used because judges dislike and tend to discourage the waiver of jury trial in felony cases.
- ☐7. The jury is used largely because it has always been the customary method of trying criminal cases and the attorneys follow precedent without giving careful consideration to the question of which method of trial would be the better in a particular case.
- ☐8. The jury is used in practically all criminal cases because the attorneys of Ohio are not well informed in regard to the practice of waiving jury trial, as the statute allowing written waiver has been in effect only two years.
- ☐9. The jury is used because of the belief that a trial before twelve laymen affords the fairest method of determining the facts and the guilt in a criminal case.
- ☐10. The jury is used because a jury taken from different occupations brings more diversified views, experiences, and knowledge of life to the settlement of a case than a single judge.
- ☐11. The jury is used because the jury tends to enable the general rules of law to be applied in such a manner as to give justice under the particular circumstances involved in a given case.
- ☐12. The use of the jury removes from the trial judge a great deal of responsibility and worry in the trial of cases and protects the judge from the criticism which results from unpopular verdicts.
- ☐13. The use of the jury decreases the possibility of political control of the courts and affords protection against the possible abuse of governmental power and the prejudices of individual judges.
- ☐14. The use of the jury enables the public to share in the administration of justice and keeps our laws practical and in harmony with the convictions and mores of the people.

If you have other reasons in mind, please state them.

An examination of Chart VI brings out that a majority of those replying believe that the jury is used because attorneys feel that one or two jurors may disagree and prevent a conviction (57.7 per cent); and because a jury trial gives attorneys more opportunity to influence the verdict by stressing imma-

CHART VI.—PER CENT DISTRIBUTION OF THE TOTAL REPLIES OF 109 JUDGES, 82 PROSECUTORS AND 400 ATTORNEYS OF OHIO ON THE REASONS WHY THE JURY IS NOT WAIVED IN A LARGER NUMBER OF CASES WHICH GO TO TRIAL IN OHIO

PER CENT



The bars of Chart VI represent the fourteen subdivisions of Question VI. The numbers below each bar correspond to the items of Question VI. The exact meaning of each bar can easily be determined by referring back to the question. The per cent at the top of each bar represents the proportion of the 591 replies which checked the item.

terial factors and by making emotional appeals to the sympathy and prejudice of jurors (54.8 per cent). Next in frequency of checks come these four factors: (a) the jury is used because laymen are easier to deceive in regard to the facts of the case than is the trial judge (43.1 per cent); (b) the use of the jury affords the defendant a better means of escaping justice (42.6 per cent); (c) a jury trial increases the possibility of securing an appeal and reversal through error in the admission of evidence (35.3 per cent); (d) the jury is used largely because it has always been the customary method of trying criminal cases and the attorneys follow precedent without carefully considering which method of trial would be the better in a particular case (36.5 per cent). Then come five factors, each checked by one-fourth to one-third of those replying: (a) the jury is used because of the belief that a trial before twelve laymen affords the fairest method of determining the facts and the guilt in a criminal case (31.6 per cent); (b) the use of the jury decreases the possibility of political control of the courts and affords protection against the possible abuse of governmental power and the prejudices of individual judges (31.1 per cent); (c) the jury is used because a jury taken from different occupations brings more diversified views, experiences, and knowledge of life to the settlement of a case than does a single judge (25.9 per cent); (d) the use of the jury enables the public to share in the administration of justice and keeps our laws practical and in harmony with the convictions and mores of the people (28.1 per cent); (e) the use of the jury removes from the trial judge a great deal of responsibility and worry in the trial of cases and protects the judge from the criticism which results from unpopular verdicts (24.7 per cent). Finally, three factors of a somewhat different nature are checked by a small number of those replying: (a) the jury is used in practically all criminal cases because the attorneys of Ohio are not well informed in regard to the practice of waiving jury trial, as the statute allowing written waiver has been in effect only two years (19.9 per cent); (b) the jury is used because judges dislike and tend to discourage the waiver of jury trial in felony cases (19.4 per cent); and (c) the jury is used because the jury permits the application of the general rules of law in such a manner as to give justice under the particular circumstances involved in a given case (12.7 per cent).

Singularly enough, the reasons most frequently mentioned indicate that the jury is used because it affords the defendant a greater opportunity of escaping conviction. This, of course, means that the factors which are emphasized as being of the greatest importance in causing the use of the jury are likewise factors which cause the greatest criticism of jury trial—the criticism of the so-called sporting theory of criminal justice in which a criminal trial is looked upon as somewhat of a game. In consequence, every opportunity must be utilized to obtain the goal, a verdict of acquittal. On the other hand, the factors which indicate that the jury is used because it affords the fairest method of determining the facts of a case and is a benefit to society are checked by a smaller proportion of those replying. A surprisingly small number state that the jury is used because it has always been the customary method of trying criminal cases, and because the attorneys of Ohio are not well informed in regard to the practice of waiving jury trial.

The judges and prosecutors hold very similar views on the reasons why the jury is not waived. Both groups stress that the jury is used because it affords the defendant a greater opportunity for acquittal. On the other hand, a much larger proportion of attorneys than either judges or prosecutors indicates that the jury is used because it is fairer to the defendant and beneficial to society. The judges also reply that the jury is used largely because it has always been the customary method of trying criminal cases.

The variation which exists on the basis of density of population is very small. The rural judges are somewhat prone to hold that the jury is used because judges dislike the waiver of jury trial in felony cases, and because the jury removes from the trial judge a great deal of responsibility and worry and protects the judge from the criticism which results from unpopular verdicts. Practically no difference exists between the views of the attorneys of the urban and rural counties.

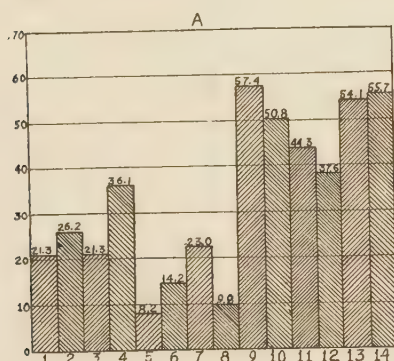
The returns from the eight large counties, however, show a considerable diversity of view on the factors which cause waiver. In general, a larger proportion of Cuyahoga, Hamilton, and the five county replies indicate that the jury is used because it is an advantage to the person charged with the commission of crime; while a larger percentage of Franklin County

replies stress the factors indicating that the jury is used because it is beneficial to society.¹⁸

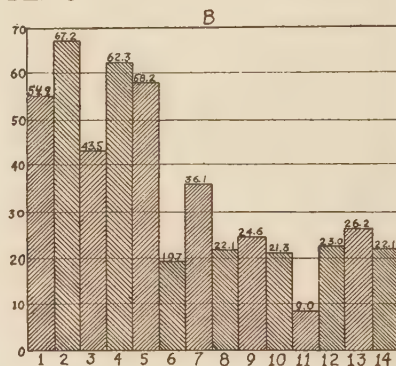
The views on the problem now under discussion that are held by those opposed to waiver and those *greatly* favoring waiver are clearly brought out in Chart VI-A.

CHART VI-A.—PER CENT DISTRIBUTION OF THE REPLIES OF THOSE OPPOSED TO WAIVER AND THOSE GREATLY IN FAVOR OF WAIVER ON REASONS WHY JURY TRIAL IS NOT WAIVED IN OHIO

PER CENT



PER CENT



The bars of the chart represent the fourteen subdivisions of Question VI. The exact meaning of each bar can easily be determined by referring back to the question. In substance the first five bars stress that the jury is used because it provides greater opportunity of preventing a conviction. The last six bars stress that the jury is used because it is fairer to the accused and a benefit to society. Diagram A reflects the vote of those opposed to waiver; diagram B, the replies of those in favor of waiver. The contrast between the views of the two groups is at once evident.

It is quite evident that the two groups emphasize entirely different reasons why the jury is waived. Those who greatly favor waiver indicate that jury trial is used because it provides a better means of escaping justice; those opposed to waiver hold that the jury is used because it is the fairest method of trial

¹⁸ The difference between two counties is clearly brought out if we notice that 65.9 per cent of Hamilton replies, as compared with only 28.0 per cent of the Franklin returns, check that the jury is used because of the possibility of one or two jurors disagreeing and thus preventing a conviction. The returns from Cuyahoga County and the remaining counties are more evenly distributed. The five-counties have the largest number indicating that the judge discourages the waiver of jury trial, while Cuyahoga has the largest number checking that the use of the jury decreases the possibility of political control of the courts and affords protection against the possible abuse of governmental power and the prejudices of individual judges.

and affords the greatest amount of protection to the individual and to society.

The comments in regard to the reasons why trial by jury is not waived show far greater tendency to stress widely different factors than to agree upon a small number of causes. A number of reasons are listed which were not included in the subdivisions of the question.¹⁹

I have talked with numerous local attorneys, and they do not understand the right to waive a jury trial (Lucas). Trial by jury is a constitutional right and very few clients, especially those who follow crime as a business, will consent to a waiver of this right. The average honest attorney hesitates to waive any right guaranteed to an accused person. There is less probability of dissatisfaction to the client if his case is tried to a jury. Attorneys like to try criminal cases to a jury because they can make a greater showing to the spectators. Defense attorneys believe that it is harder for the state to convince twelve persons of the guilt of their client than it is to convince one.

It is a common attitude of the bench that if a defendant is bound over to the grand jury and indicted he has had in effect two trials, and if innocent would have been discharged by one or the other. Prosecuting attorneys regularly discuss cases to be tried with the judges, and thereby preclude an unprejudiced hearing. Judges do not seem to have sufficient time to devote to a case; they will not listen to involved details which may enter into it, thus jury trial affords greater opportunity for justice. Newspaper comments often influence politically alert judges more than they affect juries. In rural jurisdictions, as compared to the metropolitan counties, the members of the bench seem to be inordinately severe in their sentences. Courts are too much inclined to follow precedent based upon a state of facts not in keeping with the case at bar. Verdicts of juries give us an insight as to the laws the people desire to have enforced. Too many criminal statutes, in which the general public has no interest, are put over by a small group of lobbyists; these laws are ignored by juries; they would be enforced by courts. Jurors tend to take into consideration the moral justification for the offense. A tendency exists to undermine trial by jury, and this should be discouraged by having more jury trials.

In general, the replies to the question seem to fall short of really explaining why the jury is not waived to a larger extent in Ohio. The number who check that the jury is used because the attorneys of Ohio are not well informed on the right to waive a jury and because attorneys follow precedent is surprisingly small. The percentage who state that the jury is used because of its fairness to the accused and benefit to society do

¹⁹ Approximately one-tenth, (9.4 per cent) of those replying to Question VI express their views in writing in addition to checking the form.

not indicate that these reasons are the primary motives. The largest proportion hold that the jury is used because it affords a greater opportunity of preventing a conviction. The additional comments bring out reasons which are quite convincing, and, combined with the replies to the form, provide a more adequate explanation. Even then, questions remain concerning the completeness of this explanation.²⁰

VII. THE ADVANTAGES AND DISADVANTAGES OF WAIVER

The small extent to which the jury is waived in Ohio does not decrease the significance of the fact that a large proportion of the replies indicate that they are in favor of allowing waiver because they think it has marked advantages. The vigorous opposition of the minority, on the other hand, indicates that this group believes that waiver has many disadvantages. Question VII makes specific inquiry into opinions with respect to the advantages and disadvantages of waiver. The first part of the question stresses the disadvantages of the practice of allowing the waiver of jury trial, and at the same time provides somewhat of a range of attitude in regard to the practice. The last twelve items bring out alleged benefits which may result from the waiver of jury trial.

²⁰ The extent of waiver is profoundly influenced by the factors of historical background and custom. The use of jury trial in felony cases has been firmly adhered to in Ohio, and to try an important case without a jury seems a strange and unnatural procedure. Also, it may be said that the statute allowing waiver was not given a great deal of publicity. Likewise, the fact that a defendant must waive a jury trial in writing may possibly decrease the extent of waiver. The large number indicating that the jury is used because it affords the defendant greater opportunity of escaping conviction may, to some extent, be due to an unusual provision of the Ohio Code providing for the challenging of jurors. (Paragraph 9, Section 13443-8 of the Ohio General Code, provides in substance that any prospective juror may be challenged if he has served in the trial of two or more criminal cases during the three weeks preceding the case in court.) As a result of this provision, it is difficult for the prosecution to secure a jury which has had experience in deciding criminal cases. A trial judge of Cuyahoga County comments: "It is necessary for us to summon a new jury panel each week because the attorneys challenge jurors who have served on more than two cases." Likewise, a trial judge of Summit County writes: "We are applying the new jury law in Summit County and no longer . . . have repeaters. The new jurors do not convict. Out of the last 14 felony trials in the September, 1931 term there were six convictions, seven acquittals, and one disagreement." This provision of the code, in itself, may influence the number of jury and non-jury trials, and should be given further study.

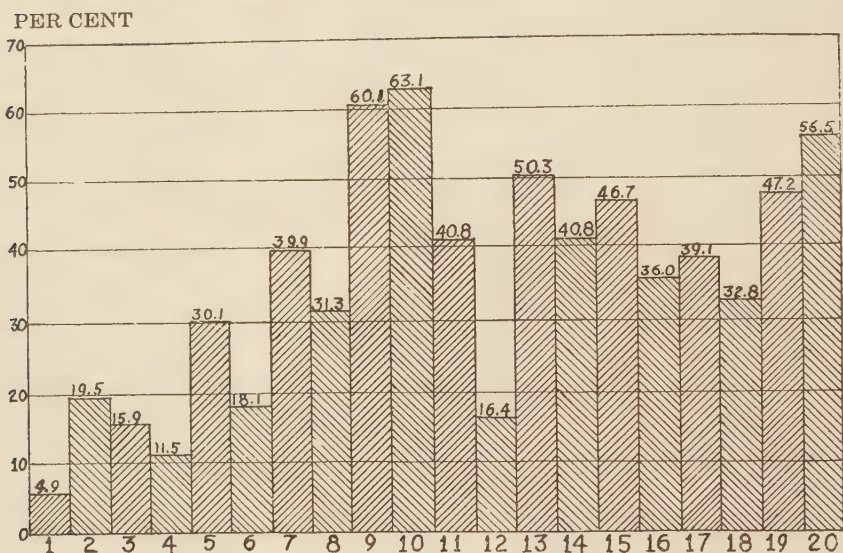
QUESTION VII. WHAT ARE THE ADVANTAGES AND DISADVANTAGES TO THE ACCUSED AND TO SOCIETY WHICH RESULT FROM THE WAIVER OF JURY TRIAL?

Please check as many entries as you wish.

-1. The waiver of jury trial is simply a device which makes it easier for those accused of crime to escape justice.
-2. The waiver of jury trial increases the opportunity for political influence and pressure to be brought to bear upon the decision of cases.
-3. The opportunity given to the defendant to choose that form of trial which he thinks best places the state at a disadvantage.
-4. A trial without a jury does not properly safeguard the larger interests of the people of the state.
-5. The waiver of jury trial is of no particular advantage or disadvantage to the state in the trial of cases.
-6. The opportunity to waive a jury may jeopardize the rights of ignorant and indigent defendants, for counsel appointed by the court may waive a jury to save time and bother when it would be to the best interests of the accused to have a jury trial.
-7. The right to waive the jury is an advantage to both the accused and to society.
-8. The right to waive the jury is a device which enables the defendant to have a fairer trial.
-9. The waiver of jury trial speeds up the court and makes possible a more immediate trial of cases.
-10. The waiver of jury trial decreases the expense involved in the trial of criminal cases.
-11. The waiver of the jury tends to decrease the amount of unwholesome publicity in the trial of offenses of immoral nature.
-12. The fact that the jury is used only in those cases in which the defendant desires it decreases the extent of jury service and increases its significance and importance.
-13. The waiver of the jury eliminates the time taken to select the jury.
-14. In non-jury trials opening statements are omitted or greatly curtailed and the closing addresses of the attorneys are shorter in the average case.
-15. The evidence is submitted in a more concise form in a non-jury case.
-16. The number of objections made to the admission of evidence is cut down and the amount of testimony heard is increased.
-17. The arguments in regard to the facts involved are curtailed in a non-jury case.
-18. The number of appeals and reversals are less in non-jury trials.
-19. Attorneys conduct non-jury trials in a spirit of helpfulness to the court.
-20. The trial is less formal than a jury trial and the judge takes a greater part in attempting to cause the parties to bring out the vital issues of the case.

If you have other reasons in mind, please state them.

CHART VII.—PER CENT DISTRIBUTION OF THE TOTAL REPLIES OF 109 JUDGES, 82 PROSECUTORS AND 400 ATTORNEYS OF OHIO ON THE ADVANTAGES AND DISADVANTAGES TO THE ACCUSED AND TO SOCIETY WHICH RESULT FROM THE WAIVER OF JURY TRIAL.



The bars of Chart VII represent the twenty subdivisions of Question VII. The numbers below each bar correspond to the items of Question VII. The exact meaning of each bar can easily be determined by referring back to the question.

If we examine Chart VII, we find that the number checking the disadvantages of waiver is small compared with the number checking the advantages of the practice. A very small number (4.9 per cent) check that the waiver of jury trial is simply a device which makes it easier for those accused of crime to escape justice. A somewhat larger proportion (15.9 per cent) indicate that the opportunity given the defendant to choose the form of trial which he thinks best places the state at a disadvantage. One out of every nine (11.5 per cent) hold that a trial without a jury does not properly safeguard the larger interests of the people of the state. One out of every five (19.5 per cent) indicate that the waiver of jury trial increases the opportunity for political influence and pressure to be brought to bear upon the decision of cases. An approximately equal number (18.1 per cent) reply that the opportunity to waive a jury may jeopardize the rights of ignorant and indigent defend-

ants, for counsel appointed by the court may waive a jury trial to save time and bother when it would be to the best interests of the accused to have a jury trial.

A considerably larger proportion check exactly opposite views on the effect of waiver. One out of every three (30.1 per cent) hold that the waiver of jury trial is of no particular advantage or disadvantage to the state in the trial of cases, while over one-third (39.9 per cent) state that the right to waive the jury is an advantage to both the accused and to society. The latter group express the belief that waiver, instead of constituting an injury to either the accused or society, is beneficial to both. A large proportion of the replies point out that the waiver of jury trial decreases the expense involved in the trial of a criminal case (63.1 per cent), and that the waiver of the jury speeds up the court and makes possible a more immediate trial of cases (60.1 per cent). A somewhat smaller percentage indicate that as a result of waiver the judge takes a greater part in attempting to cause the parties to bring out the vital issues of the case (56.5 per cent), and that the attorneys conduct non-jury trials in a spirit of helpfulness to the court (47.2 per cent).

A fairly large proportion of the replies state that the practice of waiving the jury alters the procedure of the trial. The waiver of the jury eliminates the time taken to select the jury (50.3 per cent); the evidence is submitted in a more concise form in a non-jury case (46.7 per cent); the opening statements are omitted or greatly curtailed and the closing addresses of the attorneys are shortened (40.8 per cent); the arguments relative to the facts involved are curtailed in a non-jury case (39.1 per cent); the number of objections made to the admission of evidence is cut down and the amount of testimony heard is increased (36.0 per cent); and the number of appeals and reversals are less in non-jury trials (32.8 per cent).

The remaining items are more general in nature. Over one-third (40.8 per cent) indicate that the waiver of the jury tends to decrease the amount of unwholesome publicity in the trial of offenses of immoral nature, while a slightly smaller number check that the right to waive a jury is a device which enables the defendant to have a fairer trial.

The advantages that are claimed fall in three main groups. In the first place, the trial of a case without a jury, it is alleged, decreases both the time and the expense involved in the trial of

cases. In the second place, the waiver of the jury simplifies criminal procedure, brings about a more wholesome approach to the trial, and eliminates many factors which are frequently criticised in connection with the disposal of criminal cases. Finally, it is maintained that the practice of allowing waiver in many instances enables the defendant to have a fairer trial.

The disadvantages that are charged against waiver deserve brief attention. Two items are of special significance: (1) the waiver of jury trial increases the opportunity for political pressure to be brought to bear, and (2) a trial without a jury does not safeguard the larger interests of the people of the state. A third item, that the waiver of jury trial may jeopardize the rights of ignorant and indigent defendants, applies more to the individual than to society at large. The interests of destitute defendants need special protection and a practice designed to aid the accused should not be allowed to undermine his rights.

A great similarity of view exists among the judges, prosecutors, and attorneys concerning the advantages resulting from the waiver of jury trial; some difference exists, however, concerning the disadvantages. A larger proportion of the prosecutors contend that the opportunity given the defendant to choose the form of trial he thinks best places the state at a disadvantage; a larger proportion of judges feel that a trial without a jury does not safeguard the general interest of the state; a larger percentage of attorneys believe that the waiver of jury trial increases the opportunity for political influence and pressure to be brought to bear upon the decision of cases, and that the opportunity to waive a jury may jeopardize the rights of ignorant and indigent defendants. The judges are least, and the attorneys most, inclined to say that the right to waive the jury is an advantage to both the accused and to society.

The point of view does not show much variance as between rural and urban regions. The judges and attorneys of the two districts are in virtual accord as to the effects of waiver. The replies from the large counties, however, present some interesting differences. A larger proportion of the replies from Hamilton County minimize the evils and emphasize the advantages of a non-jury trial than do the returns from the other counties, while Cuyahoga County has the largest number indicating that the waiver of jury trial increases the opportunity

for political influence and pressure to be brought to bear upon the decision of cases.

Quite naturally, those opposed to waiver and those *greatly* favoring waiver hold contrasting views on the benefits and evils of the practice. This is particularly evident in the checking of the statements that "The waiver of jury trial increases the opportunity for political influence and pressure to be brought to bear upon the decision of the case," and "A trial without a jury does not properly safeguard the larger interests of the state." The proportion of those opposed to waiver who checked these statements was from four to six times as great as the proportion of those *greatly* favoring waiver. On the other hand, those favoring waiver checked to a greater extent the statements dealing with the benefits of the practice.

The additional comments present widely varying views.²¹

The expense of keeping prisoners in a given county is decreased and space provided for other offenders, due to quicker incarceration in the state prison or release from jail. A trial to the court in criminal cases demonstrates that there is an astounding amount of evidence received in a jury case which is not really material to the issue but introduced for the effect it may have upon the jury. A court trial eliminates much barnstorming and stage acting on the part of lawyers for both state and defense.

We would need fewer judges . . . but why not more judges? A jury trial takes more time and costs more money, but if it has been proved to be worth the time and increased cost to society, we should bear the cost without complaint. The fact that the trial is less formal than a jury trial and that the judge takes a greater part in attempting to cause the parties to bring out the vital issues of the case is a bad thing. The trial judge often interferes too much. The judge disregards rules of evidence and hears everything. If these questions are answered affirmatively, it strikes at all rules of pleading, evidence and procedure which have been promulgated to protect and safeguard the rights of society as well as the rights of the defendant. To increase speed and lessen expense at the sacrifice of the constitutional rights of man in this country is not worth the price. Contrary to the general belief, there are too few reversals in this country. We should improve jury trial by making the selection of jurors informal and pretrial, with right to formal examination in exceptional cases as to particular jurors.

There is some danger that the right to waive a jury trial will jeopardize the rights of ignorant and indigent defendants, but this danger is not great. The defense attorney should be required to make an affidavit to the effect that it is the defendant's wish and not his that jury trial be waived.

²¹ Only a small proportion, (9.0 per cent) of those answering Question VII make additional comments.

In general, the alleged benefits of waiver to both the accused and to society seem to outweigh the disadvantages of the practice. The privilege given the defendant of having a more learned and presumably more capable tribunal pass upon the evidence when he believes the jury unfairly prejudiced, enables him to have a fairer trial. At the same time society benefits as a consequence of the more rapid disposal of cases and the decreased expense resulting from waiver. The proceeding is an advantage, not only because of its saving of time and money, but also because it simplifies criminal procedure and tends to cause the trial to take on the form of a more serious attempt to determine the truth.

A careful examination of the results of waiver brings out that it removes the aspects of criminal trials which have been particular objects of criticism. Not all, however, agree that the factors listed are advantages. A number believe that the trials are too informal, and that this practice breaks down the rules of evidence and procedure designed to protect and safeguard the rights of the accused. Actual observation of the courts would indicate that these advantages exist, but great care and watchfulness is necessary or abuses will arise in connection with this more informal procedure.

VIII. THE EFFECT OF WAIVER UPON THE LENGTH OF TRIALS

The matters of time and expense are not as vital as other factors in the administration of justice, but they cannot be ignored. The theory that a court trial reduces the time taken to try a case may well be investigated, and this is attempted in Question VIII.

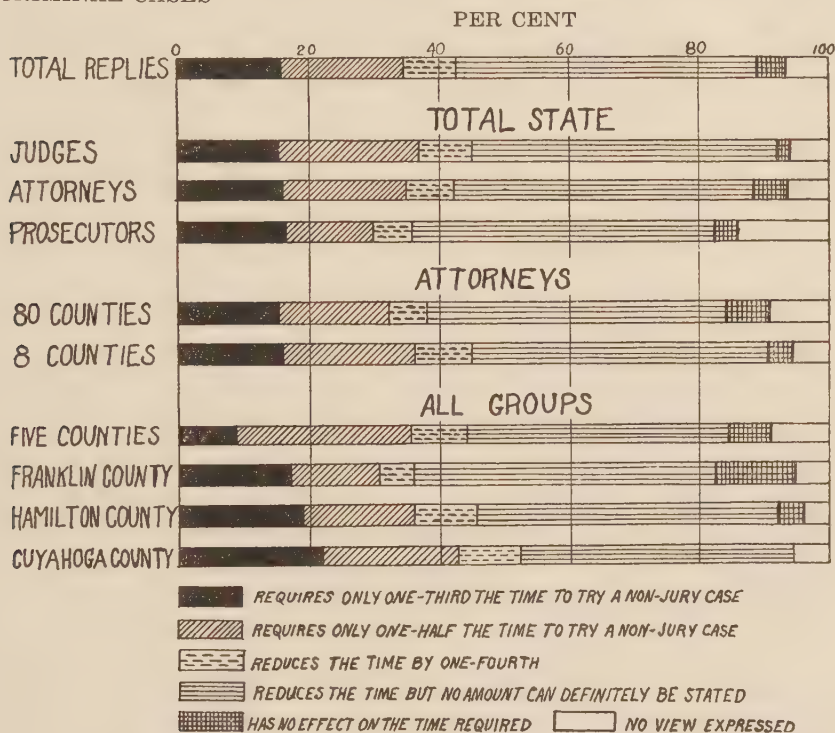
QUESTION VIII. WHAT EFFECT DOES THE WAIVER OF JURY TRIAL HAVE UPON THE TIME TAKEN TO TRY THE CASE?

Please check one entry only.

-1. It takes only one-third the time to try a non-jury case that it does a jury case.
-2. It takes only one-half the time to try a non-jury case that it does a jury case.
-3. The waiver of the jury reduces the time required to try a case by one-fourth.
-4. The waiver of jury trial reduces the time required to try a case but no definite amount can accurately be stated.
-5. The waiver of the jury has no effect on the time required to try a case.
-6. The waiver of the jury increases the time taken to try a case.

Please add such comments as you may wish to make.

CHART VIII.—PER CENT DISTRIBUTION OF THE REPLIES OF 109 JUDGES, 82 PROSECUTORS AND 400 ATTORNEYS OF OHIO, ON THE EFFECT OF NON-JURY TRIAL UPON THE TIME TAKEN TO TRY CRIMINAL CASES



A moment's examination of Chart VIII brings out that nine-tenths (88.6 per cent) of the replies hold that the waiver of jury trial reduces the time taken to try the case. One-sixth of the total (16.1 per cent) indicate that it takes only one-third the time to try a case to the court, while nearly one-fifth (18.8 per cent) state that waiver reduces the time taken to try a case by one-half. Three per cent indicate that waiver has no effect upon the time taken to try a case, while 1.0 per cent signify that waiver increases the amount of time required.

In general, the attitude toward the effect of the waiver of jury trial upon the amount of time taken to try a case is very much the same regardless of group or density of population. The large counties show the widest variance. The contrast between those *greatly* in favor of waiver and those opposed to

waiver is brought out by the number checking the more extreme statements in Question VIII. One-fourth of those *greatly* in favor of waiver, as compared with one-twelfth of those opposed to waiver, designate that a non-jury trial reduces the time taken to try a case by two-thirds.

The comments relative to the effect of waiver upon the time involved in the trial of a case are equally divided between those who stress that waiver is an advantage because it reduces the time required and those who maintain that the matter of time is not important.

The time taken depends on the judge and attorneys. Waiver of jury trial speeds up a criminal docket and gives the accused the so called "speedy justice" so much advocated by the late Chief Justice Taft and the British courts. In a well advertised first degree murder, or bank looting case, where the public interest is at fever heat, it occasionally requires a week to qualify a jury. "I have tried cases to the court that have taken a half day with the jury waived, whereas if the same case were tried before a jury, I am confident it would have lasted one and a half or two days." Only such time is used in a court case as would be needed to argue questions of doubtful fact and law.

What importance is the matter of time compared to the life, liberty or reputation of a human being? We should take sufficient time to give the defendant a fair trial. It is justice, not time, that is vital. Where the decision of the court is announced at once, the time is shortened, but when the decision is reserved until a later date the total time taken may be much longer. In most criminal trials today venires are previously prepared and at hand from which to select. The written application to waive and time to decide probably require as much time as it would take to examine and qualify a jury. "It is my experience on the bench and at the bar that cases tried to juries are better prepared and presented and more speedily disposed of than those tried to the court."

The amount of time taken in jury and non-jury cases depends to a considerable extent upon the firmness of the bench, the attitude of the attorneys, and the laws and customs surrounding the use of the jury. The jury at its worst is a tremendously time-consuming tribunal. The jury at its best disposes of cases in a much more rapid manner. On the other hand, there can be little doubt that a non-jury trial decreases the time required to dispose of a case.

IX. THE EXTENT TO WHICH THE JUDGE SHOULD ADVISE THE JURY

The extent to which the trial judge should have the right to comment upon the evidence bears little relation to the waiver

of jury trial and may be considered a separate inquiry; it is, however, one of great current interest. Question IX is concerned with this problem.

QUESTION IX. DO YOU FAVOR A PROVISION ALLOWING THE TRIAL JUDGE IN JURY CASES TO GIVE HIS OPINION IN REGARD TO THE FACTS OF THE CASE AND HIS VIEWS AS TO THE WEIGHT OF EVIDENCE AND THE GUILT OR INNOCENCE OF THE DEFENDANT PROVIDING THAT THE FINAL DECISION RESTS IN THE HANDS OF THE JURY? *Please check one entry only.*

-1. I am very much in favor of such a provision.
-2. I favor such a provision.
-3. I do not have very marked views either in favor of or against such a practice.
-4. I do not favor such a practice.
-5. I am very much opposed to such a practice.

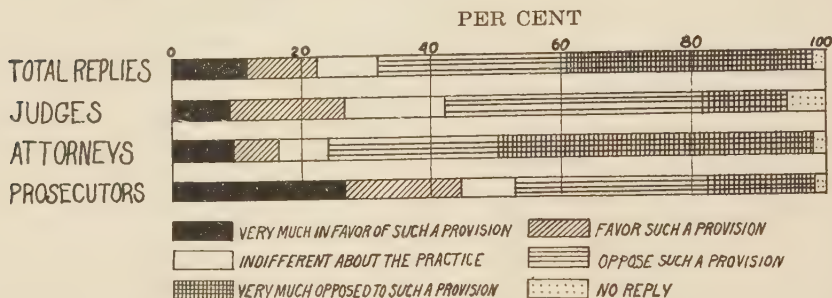
Please give your reasons for the position taken.

The question as it is stated would give to the trial judge even greater power to advise the jury than is had by the Federal courts. A number of replies comment that although they favor allowing the trial judge the right to advise the jury, they believe that Question IX contemplates giving the judge too much power. The question would have been better had it been less broad in scope—if the provision allowing the trial judge to comment as to the guilt or innocence of the defendant had been omitted. The extent to which the more extreme statement diminished the number who favored this provision cannot be determined. The returns must be considered with this in mind.

If we glance at Chart IX, we find that 11.8 per cent *greatly* favor and 10.7 per cent favor allowing the judge to give his opinion in regard to the facts and to comment on the weight of evidence and the guilt or innocence of the defendant. A fairly large number (9.0 per cent) are indifferent about the practice. On the other hand, 29.1 per cent oppose and 36.9 per cent *greatly* oppose allowing the trial judge this right.

The replies of the special groups differ markedly from the results for the state as a whole. If we combine the first two sections of the bars representing those who *greatly* favor and who favor giving the trial judge this right, we have one-fourth of the judges (27.5 per cent), nearly one-half of the prosecutors (45.1 per cent), and one-sixth of the attorneys (16.5 per cent) in favor of allowing the trial judge this right. The last two sections of the bar indicate that three-fourths of the attorneys

CHART IX.—PER CENT DISTRIBUTION OF THE REPLIES OF 109 JUDGES, 82 PROSECUTORS AND 400 ATTORNEYS OF OHIO, ON THE ADVISABILITY OF ALLOWING THE TRIAL JUDGE IN A JURY CASE THE RIGHT TO COMMENT UPON THE EVIDENCE AND THE GUILT OR INNOCENCE OF THE DEFENDANT



(74.0 per cent), one-half of the judges (52.3 per cent), and almost one-half of the prosecutors (45.2 per cent) oppose this provision. The prosecutors are about equally divided on the issue, while the judges tend toward disapproval and the attorneys disapprove decidedly.

The judges of the urban counties are more inclined to favor this practice than are the rural judges. The attorney returns remain virtually the same regardless of the density of population. The larger counties, likewise, do not vary markedly in their views. In passing, it may be noted that, of those who *greatly* favor waiver, a larger proportion favor giving the trial judge this right than obtains among those opposed to waiver. The replies of those opposed to waiver are overwhelmingly against this practice.

The additional comments in regard to this provision, particularly on the part of attorneys, are numerous and emphatic.²² The significance of the change, combined with the extremely large power which it proposes to give the trial judge, tends to explain the vigorous statements in regard to it.

COMMENTS IN FAVOR OF ALLOWING THE TRIAL JUDGE THE RIGHT TO ADVISE THE JURY AS TO THE FACTS OF THE CASE

More substantial justice is done in the United States Courts where the judge is permitted to comment. The rule works well because the jury may sometimes need the court's help. The fact that the judge cannot assist the jury is the outstanding weakness of the jury system. Judicial guidance

²² Nearly two-fifths of the total replies (39.1 per cent) comment concerning the desirability of such a provision.

concerning the facts was an original characteristic of jury trials; its more recent denial was the greatest mistake of state jurisprudence. One cannot effectively comment upon the law without commenting upon the facts. The practice of allowing the judge to comment aids justice and enables the greater experience of the trial judge to be utilized; it results in more substantial justice being done; it gives the jury the advantage of a disinterested opinion of a man with a trained legal mind; it would counterbalance the effect of sympathy or prejudice or popular sentiment upon the jury. Judges are less biased and more intelligent; the trial judge is more capable of analyzing the testimony and detecting the truth or falsity of the claims of the parties. The instances are legion in which the individual juror misses material facts and overemphasizes unimportant contentions; laymen lack the ability to "sense" what facts are of prime importance. The court could relegate certain testimony to its proper sphere.

Such a rule would facilitate the trial of criminal cases in that more prisoners would plead guilty, justice would be speedier and more accurate. A shallow defense would be given the little consideration due it. Irrelevant issues raised by defense lawyers would be brushed aside.

COMMENTS OPPOSED TO ALLOWING THE TRIAL JUDGE THE RIGHT TO ADVISE THE JURY AS TO THE FACTS OF THE CASE.

Power is safe in the hands of an able judge, but it is dangerous in the hands of a poor one. In Great Britain, for example, where the ablest lawyers are elevated to the Bench, judges are permitted to do these very things with great advantage to both the accused and the state. Because of our elective system, it would be dangerous to place such a provision in the law. The right would enable the trial courts in many cases to prevent a miscarriage of justice, but this advantage is more than set off by the fact that some few judges who are of a temperamental disposition would abuse this privilege. As Assistant United States Attorney, I have noticed in the Federal Courts that the best judges are very moderate in their comments upon the evidence and the guilt or innocence of the defendant. The jury, also, may resent the judge's comment and render a verdict contrary to it.

It is essential to the proper conduct of the judicial branch of the government, as it is to the other branches, that responsibility be fixed, and that the body or officer on whom the responsibility rests be made to know that it does rest upon him. Expressions of opinion by the court tend to shift the attention of the juror from the evidence to the views of the court. A judge may direct a jury to do things he would not do himself. The trial court could possibly sway the jury to such an extent that it would bring in an unfair verdict; the court would know that it could not be blamed publicly, inasmuch as the jury had the final decision. Either the jury or judge should try the facts, but never both. A court trying a case without a jury takes full responsibility and is sobered thereby.

A judge is only human and is generally very conservative and slow to feel the pulse of the public. Courts, by reason of their practice in former years or by reason of some unfortunate personal experience, are just as likely to

be prejudiced as a juror, and there is no one present to reason the matter out with him as there is in the case of a jury. Many judges are former prosecutors and labor under the complex that one indicted is presumably guilty. Judges often have strong prejudices against those accused of crime. The practice would be subject to grave abuse.

If our judiciary were free from political influence, and that in most cases would mean free from favoritism toward some group or groups and not so amenable to the influence of public sentiment, it would not be so dangerous. In political trials (so called) much harm would follow. Influence does not affect a jury; they are not candidates, and fortunately for the administration of justice, they generally are not going to be. Such a provision may cause further effort to subject the trial judiciary to political control or pressure.

The theory and purpose of jury trial would be destroyed. If the judge could comment, he could thereby control and direct the verdict. The very fact that the trial is by jury is conclusive that the jury should be the sole judge of the evidence. The jury would be useless as a free and impartial verdict could not be expected. It would nullify the benefits of trial by jury; the accused would be denied his right to a jury trial.

Experience in the Federal Courts has shown that juries invariably follow the judge's view. When the judge comments, the jurors do not for themselves weigh the evidence as they ought, and arrive at their own conclusions, but are likely to, and often do, accept the views of the trial judge as to the facts of the case. The idea of the final decision resting in the hands of the jury becomes a fiction. It would be better to abolish trial by jury than to allow this.

The jury is better qualified to determine disputed facts than a court. The judgment of the average jury, as a rule, is accurate in arriving at guilt or innocence without the judge's assistance. Such a provision tends to confuse the well defined distinctions between the function of the court and jury and would give rise to many vexatious questions on error proceedings. The practice would result in greater criticism of the trial judge and more prejudice against the court. If the jury did not follow the court, it would cause criticism. What we need is abler jurors.

X. THE EFFECT OF WAIVER UPON THE WORK OF THE PROSECUTOR AND THE DUTIES OF THE JUDGE

The effect of waiver upon the work of the prosecutor and the duties and responsibilities of the judge were taken up in Questions X-A and X-B which are very similar in nature.

QUESTION X-A. WHAT EFFECT DOES THE PRACTICE OF ALLOWING THE WAIVER OF JURY TRIAL HAVE UPON THE WORK OF THE PROSECUTING ATTORNEY? *Please check one entry only.*

-1. The waiver of jury trial greatly increases the difficulty of my work.
.....2. The waiver of jury trial increases the difficulty of my work.

-3. The waiver of jury trial is entirely without effect upon my work.
-4. The waiver of jury trial facilitates my work.
-5. The waiver of jury trial greatly facilitates my work.

Please explain in what way the waiver of jury trial aids or hinders you in your work.

QUESTION X-B. WHAT EFFECT DOES THE WAIVER OF JURY TRIALS HAVE UPON YOUR DUTIES AND RESPONSIBILITIES AS A JUDGE?

Please check one entry only.

-1. It greatly increases the duties and responsibilities of my office.
-2. It increases the duties and responsibilities of my office.
-3. It increases the duties and responsibilities of my office only to a very small extent.
-4. It does not influence the duties and responsibilities of my office.
-5. It decreases the duties and responsibilities of my office.

Please add such comments as you may wish to make.

One-tenth (9.8 per cent) of all replies to Question X-A indicate that the waiver of jury trial *greatly* facilitates the work of the prosecutor. A much larger proportion (40.6 per cent) hold that waiver facilitates the work of the prosecutor. One-fourth (23.2 per cent) state that the waiver of jury trial is entirely without effect upon their work. An approximately equal number fail to answer the question.

The replies of the judges show a very different situation. One-tenth (10.2 per cent) of the judges indicate that waiver of jury trial *greatly* increases the duties and responsibilities of their office. Over one-third (39.5 per cent) of the judges reply that waiver increases their duties and responsibilities. One-seventh (15.6 per cent) check that waiver increases the duties and responsibilities of their office only to a small extent. One-sixth (17.4 per cent) indicate that waiver does not influence the duties of their office, while one-fifteenth (6.4 per cent) allege that waiver decreases the duties of their office.

The increase of duties which the waiver of jury trial imposes upon the judges is not nearly as important as the attitude of the judges toward those duties and responsibilities. If the trial judges are willing to accept these duties, the added burden is of little significance. The attitude of the judges is clearly brought out by the following question.

QUESTION XI. DO YOU OBJECT TO THE ADDITIONAL BURDEN AND RESPONSIBILITY WHICH THE WAIVER OF JURY TRIAL PLACES UPON YOU? *Please check one entry only.*

-1. I seriously object to the additional responsibilities and duties which result from the waiver of jury trial.
-2. I seriously object to the responsibility of trying homicide cases but not to others.
-3. I do not like the additional responsibility which the waiver of jury trial places upon me but I am willing to accept it as a part of my duty as a judge.
-4. I do not object to the additional responsibility which the waiver of jury trial places upon me.
-5. The waiver of jury trial does not seem to make any difference in regard to my work and I have no reaction toward it.
-6. I welcome the opportunity to try felony cases without a jury for it decreases my work.

Please add such comments as you may wish to make.

The returns are interesting. Only 1.0 per cent of the judges seriously object to the burden and responsibility which the waiver of jury trial involves. One-tenth (9.2 per cent) object only to the responsibility of trying homicide cases. One-fourth (27.5 per cent) indicate that they do not like the responsibility which the waiver of jury trial places upon them, but that they are willing to accept it as a part of their duty as a judge. A large number (42.2 per cent) reply that they do not object to the additional responsibility which results from waiver. One-twelfth of the judges (8.3 per cent) check that the waiver of jury trial does not seem to make any difference in regard to their work and that they have no reaction toward it. One-twentieth of the total (5.5 per cent) state that they welcome the opportunity to try felony cases without a jury. In general, the replies indicate that the judges of Ohio are willing to accept the duties, with the possible exception of homicide cases, which the waiver of jury trial places upon them.

CHAPTER III

THE USE AND RESULTS OF WAIVER IN OHIO AND MARYLAND

I. THE EXTENT TO WHICH NON-JURY TRIAL IS USED

In studying the results of the waiver of jury trial in Ohio and Maryland certain differences between the two jurisdictions should be kept in mind. Ohio is a code state, while Maryland is a common law state. Ohio has only recently adopted the waiver of jury trial; Maryland has tried criminal cases without a jury since colonial times.¹ In Ohio, as in most jurisdictions, the jury is judge of the facts alone; in Maryland, the jury is judge of both the law and the facts. These variations make a study of the waiver of jury trial in the two states a matter of special interest.²

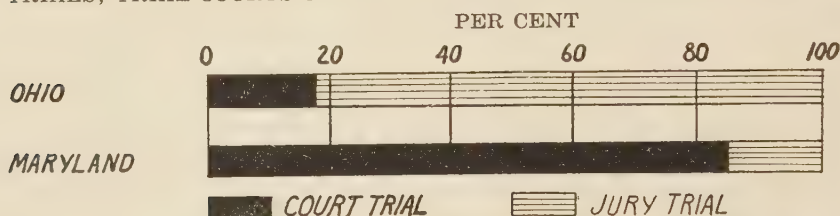
The first question which arises is the extent to which a non-jury trial is used in Ohio and Maryland. Chart X brings out the relative proportion of jury and judge trials in the two states for the cases disposed of by the courts of general jurisdiction in the calendar years 1930 and 1931. In Ohio, 17.8 per

¹It is, in fact, an error to speak of the waiver of jury trial in Maryland. The term "waiver" assumes that the normal practice is trial by jury, whereas in Maryland the defendant is asked whether he will be tried by the court or by a jury, and he may elect the type of trial he desires. Cases are not tried by jury unless the accused says that he desires a jury trial. In general, the reader who is interested in the historical and general aspects of "The Trial of Criminal Cases Without Juries in Maryland" should see the able article on the subject, written by Judge Carroll T. Bond, presiding Judge of the Court of Appeals of that state. *American Bar Association Journal*, Vol. XI, p. 699.

²The statistical data come largely from the following studies: Marshall, "Comparative Judicial Criminal Statistics: Ohio and Maryland, 1930," "Maryland Trial Court Criminal Statistics, 1930," "Judicial Criminal Statistics in Maryland, 1931," "Comparative Judicial Criminal Statistics: Six States, 1931," and Bettman, Jamison, Marshall and Miles, "Ohio Criminal Statistics, 1931." The method followed was derived from the study of Messrs. Hotchkiss and Gehlke, "Uniform Classification for Judicial Criminal Statistics." The offense grouping which was followed is the one used for the Uniform Crime Reports issued by the Federal Department of Justice. The unit of counting was the defendant, not the offense, or the proceeding, or the case. The bulletins cited above were published by the Johns Hopkins Press.

cent of the trials are without a jury, while 82.2 per cent are by a jury. In Maryland, 85.7 per cent of all trials are to the court, while only 14.3 per cent are jury trials. The situation in regard to the use of court trial is almost reversed in the two states.

CHART X.—COMPARATIVE USE OF COURT TRIALS AND JURY TRIALS; TRIAL COURTS OF OHIO AND MARYLAND: 1930 AND 1931



The data cover the total number of defendants indicted and disposed of in the courts of general jurisdiction. The jury is used in the great majority of cases which go to trial in Ohio, while the court is used in an even larger proportion of cases which go to trial in Maryland. The absolute figures on which the chart is based are as follows:

	Total	Court Trial	Jury Trial
Ohio	2836	504	2332
Maryland	5242	4492	750

The extent to which the jury is actually waived in Ohio is even smaller than the chart indicates. Nearly one-third of the cases in which a non-jury trial is used in the courts of general jurisdiction are liquor cases, a large proportion of which, under Ohio law, must be tried to the court.³ Thus, the jury is waived in only 12.0 per cent of the felony cases which go to trial.

A further inquiry into the use of non-jury trials in Ohio in 1931, as compared with 1930, reveals that there were fewer cases tried without a jury in 1931. In 1930, 19.6 per cent of the trials were to the court alone; in 1931, only 16.2 per cent were tried by the court. This situation is due to a marked decrease in the number of liquor cases disposed of during the second

³ The situation with respect to violations of liquor laws can be best understood after an examination of the pertinent part of the code.

Any justice of the peace, mayor, municipal or police judge, probate or common pleas judge within the county with whom the affidavit is filed charging a violation of any of the provisions of this act, when the offense is alleged to have been committed in the county in which such mayor, justice of the peace, or judge may be sitting, shall have *final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part of the penalty*, (that is, largely in cases in which the defendant is charged with the sale rather than the manufacture of intoxicating liquor), but error may be prosecuted to the judgment of such mayor, justice of the peace or judge as herein provided. * * * —General Code, 6212-18. Italics ours.

year. If this group of cases is eliminated, waiver took place in 9.5 per cent of the cases in 1930, and 14.3 per cent of the cases in 1931. The 1932 returns will probably show a similar increase.⁴

Interesting differences exist in Ohio between the urban and the rural jurisdictions, as may be seen from Chart XI. If we consider the total number of cases which are tried by the court, the difference between the urban and rural sections of the state is not marked. If, however, we consider only the cases in which the jury is actually waived, the situation is found to be greatly altered. Disregarding liquor cases in which the defendant is not entitled to a jury trial, the jury is waived in 15.7 per cent of the cases which go to trial in the eight urban counties and in only 8.1 per cent of the cases in the eighty rural counties.⁵ Likewise, the jury is waived more frequently in the twenty-three more densely populated counties than in the fifty-seven small counties.

The larger counties of Ohio show wide variations in the use of waiver. The range is from zero in Montgomery County to 46.1 per cent in Scioto. One-fourteenth of the trials in Lucas, one-eighth in Summit, one-sixth in Hamilton and Cuyahoga, one-fifth in Mahoning, and nearly one-third in Franklin are non-jury trials.⁶ The proportion of court trials is even

⁴ In other jurisdictions, where the practices of allowing the waiver of jury trial has recently been adopted, a non-jury trial is used in a larger per cent of felony cases than in Ohio.

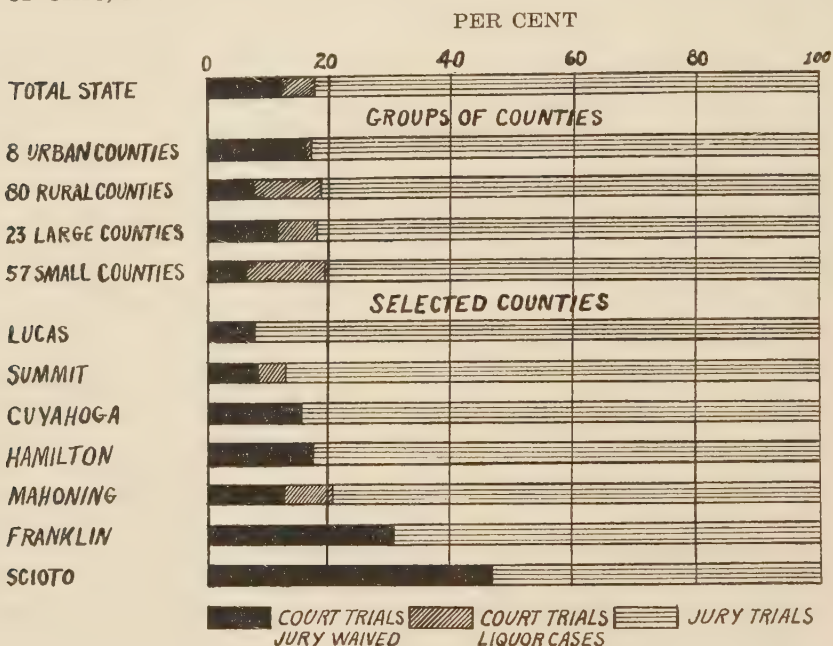
An investigation of the results of the Connecticut law allowing waiver, during the first three years in which it was in operation, brought out that three-fifths (60.5 per cent) of all trials were court trials. In New Jersey, 51.2 per cent of the trials were by the court, in the year 1931. During the first year waiver was in effect in California, non-jury trial was used in 27.0 per cent of all trials. A careful study of the waiver of jury trial in Detroit during the first year the statute allowing waiver was in effect in Michigan revealed that 60.0 per cent of the trials were without a jury. Within a year after the decision allowing waiver in Illinois, the jury was waived in two-thirds of the felony cases going to trial in Chicago. It is estimated that 85.0 per cent of all felony trials in Milwaukee and 90.0 per cent of such trials in Indianapolis are without a jury. In Washington, Oklahoma, and Rhode Island, the statutes allowing waiver have not changed the method of trying cases.

Ohio may thus be considered a state in which the right to waive a jury is used in a comparatively small proportion of cases. J. A. C. Grant, "Felony Trials Without a Jury," *American Political Survey Review*, Vol. 25, p. 982, and other sources.

⁵ In large counties liquor cases involving fines are disposed of frequently in the municipal and police courts.

⁶ A recent inquiry on the part of the writer brings out that the waiver of jury trial has greatly increased in Summit, Hamilton and Cuyahoga Counties. Little change has taken place in other jurisdictions. Data secured from the court clerk of the Urban Counties, February, 1933.

CHART XI.—COMPARISON, IN PERCENTAGES, OF THE NUMBER OF COURT TRIALS AND JURY TRIALS IN THE COMMON PLEAS COURTS OF OHIO, 1930 AND 1931: BY JURISDICTION



greater in Stark, Butler, and Lawrence Counties, but the small number of cases makes these figures of little value. The proportion of non-jury trials is greatest in Scioto. Nearly half of all felony cases in that county are tried by the court.

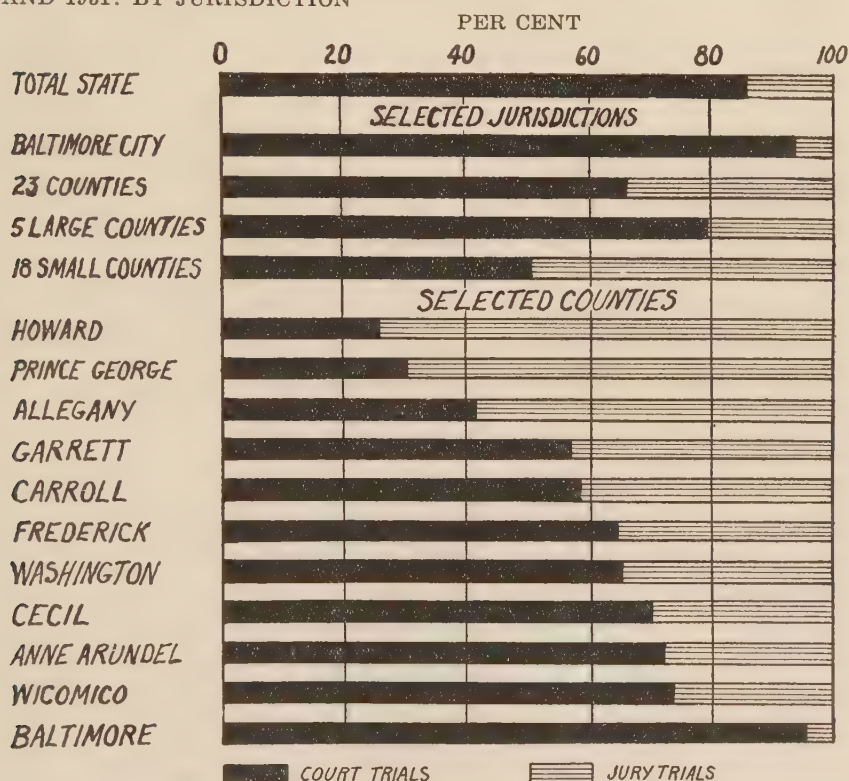
The causes for the differences in the extent of waiver are not fully known. Local custom is an important factor. Thus, in Scioto County the waiver of jury trial has been a customary procedure for a period of years. On the other hand, an investigation which was made in regard to the large number of non-jury trials in one county seemed to indicate that the situation was due to the personality and disposition of certain judges who were known to be especially lenient.

The various jurisdictions in Maryland also show wide differences in regard to the use of jury and non-jury trials. Over nine-tenths (94.0 per cent) of all cases in Baltimore City are

tried by the court, while two-thirds (66.3 per cent) of the cases in the counties are tried by the court.⁷

The counties, in turn, tend to fall into two groups. The court is used in nearly four-fifths (79.9 per cent) of the cases which go to trial in the five large counties. On the other hand, nearly one-half (49.2 per cent) of the cases in the eighteen smaller counties are tried before juries.

CHART XII.—COMPARISON, IN PERCENTAGES, OF THE NUMBER OF COURT TRIALS AND JURY TRIALS IN THE CRIMINAL COURT OF BALTIMORE CITY AND THE CIRCUIT COURTS OF MARYLAND, 1930 AND 1931: BY JURISDICTION



⁷ An inquiry was made concerning the reasons for the large use of non-jury trials in Maryland. The following factors were alleged to enter. 1. The right to try criminal cases without a jury has always existed in Maryland and it is accepted as a normal method of trial. 2. The judges of the state are either appointed or elected for 14 years and are held in high esteem. 3. A widespread belief exists among attorneys that a court trial is the simplest and most satisfactory way of trying criminal cases. 4. At least one-third

The individual counties present even greater contrast. Baltimore County with 96.2 per cent of its trials held without a jury has by far the largest proportion of court trials. Wicomico, Anne Arundel, Cecil, Washington, Frederick, Carroll, Garrett, and Allegany have from fifty to seventy-five per cent of their trials by the court. Prince George's County, with over two-thirds (68.8 per cent), and Howard, with nearly three-fourths (74.5 per cent) of their cases tried before juries, are virtually in a class by themselves. These differences cannot be accounted for on the basis of location. Two adjoining counties, Baltimore and Howard, which border on Baltimore City, offer the greatest extreme in the use of court trials.⁸

As an eminent Maryland judge brings out, court trial is regarded with greater favor in the more populous counties, while jury trial appears to be more in demand in the less densely populated counties. In these counties the relatively slight pressure of litigation lends itself readily to the more leisurely procedure of jury trials. "The accused and his lawyer are more apt to be acquainted with the members of the jury and to take into account a personal relationship which they think may be conducive to a favorable result in the trial."⁹ The personality and disposition of the trial judge are important factors which affect the proportion of jury and non-jury trials.

of all defendants in Maryland are Negroes, a large proportion of whom prefer to have their cases tried by the court. 5. The jurisdiction of the Criminal Court of Baltimore City includes a number of small cases which are usually disposed of without a jury. 6. The practice of assigning counsel to defend the accused is restricted to cases of considerable importance. The difficulties of conducting a jury trial, combined with the belief that the judge will look out for their interests, cause virtually all defendants without counsel to select a court trial. 7. The jurors are judges of the law as well as the facts in Maryland. 8. The signing of a formal waiver of a jury trial is not required, and cases are not tried by jury unless the accused designates that form of trial. The reasons listed are based on personal observation, and upon the statements of judges and attorneys of Baltimore City.

⁸ Inquiry concerning this wide difference brought out such comments as these: 1. Baltimore County is larger and more under the influence of the city. Howard County is smaller and maintains its rural customs. The pressure of business in Baltimore County is greater than in Howard. 2. The attorneys of Howard County are well acquainted with their jurors and know what to expect from them, and thus prefer a jury trial. 3. Finally, there is alleged to be a difference of disposition and experience between the judges of the counties.

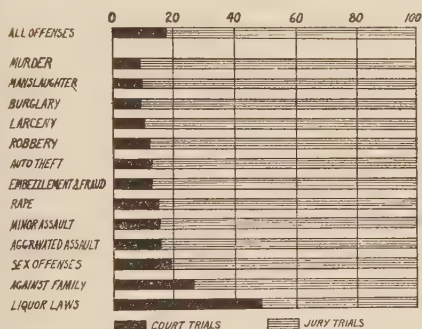
⁹ Frank, Eli., Judge of the Superior Court of Baltimore City, *Virginia Law Review*, vol. 17, p. 258.

II. THE TYPE OF OFFENSE IN WHICH THE JURY IS WAIVED

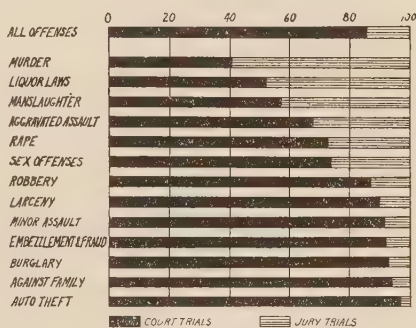
An examination of the extent to which non-jury trials are used in the various classes of offenses show that here also considerable differences exist. Chart XIII shows that court trials are used in a far greater proportion of liquor cases in Ohio than in other classes of offenses. This situation, as has been explained before, is more of a compulsory than a voluntary matter. The range in the extent of the use of non-jury trials is not especially marked in other offenses. A court trial is used the least in murder, manslaughter, burglary, and larceny cases. It is used somewhat more frequently in robbery, auto theft, embezzlement and fraud, rape and assault cases, and most frequently in sex offenses, and offenses against the family.

CHART XIII.—COMPARISON, IN PERCENTAGES, OF COURT TRIALS AND JURY TRIALS IN OHIO AND MARYLAND 1930 AND 1931: BY OFFENSE CLASSES

A. OHIO PER CENT



B. MARYLAND PER CENT



The Maryland situation differs somewhat from that of Ohio. Non-jury trials, as in Ohio, are used to the smallest extent in murder and manslaughter cases. Also, as in Ohio, a non-jury trial is used frequently in offenses against the family. On the other hand, as Chart XIII reveals, court trials are used infrequently in liquor cases in Maryland. The difference in the laws and possibly the sentiment in the two states explains this contrast. Court trials in Maryland are used less frequently in aggravated assaults, rape cases, and sex offenses, and much more frequently in burglary, auto theft, and embezzlement and fraud cases. Robbery, larceny, and minor assault occupy the middle position. In view of Maryland's longer history of court

trials, her variance in the use of jury and non-jury trials in different offense classes probably presents a more accurate picture of the results of allowing waiver than do the Ohio returns.

III. THE NUMBER OF CONVICTIONS AND ACQUITTALS IN JURY AND NON-JURY TRIALS

As has been brought out earlier, the defendant and his attorney desire that form of trial which they feel will be to their best interest. In the past, this has been largely a matter of the tribunal which would enable the accused to secure an acquittal. At present, other factors possess some significance, but the number of convictions and acquittals still deserves attention.

CHART XIV.—COMPARISON, IN PERCENTAGES, OF CONVICTIONS AND ACQUITTALS IN JURY TRIALS AND COURT TRIALS IN OHIO AND MARYLAND, 1930 AND 1931

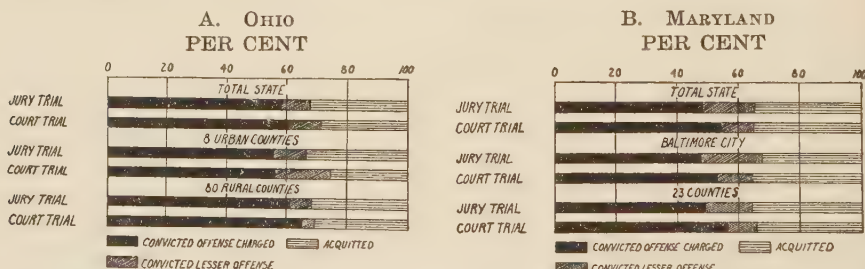


Chart XIV shows that in Ohio the proportion of convictions is larger in court trials than in jury trials. This is especially true in the large counties where three-fourths of all court trials, as compared with two-thirds of the jury trials, result in convictions. The method of trial has much less effect upon the result in the rural sections.¹⁰

¹⁰ A more detailed analysis of the data was made to determine whether the large number of liquor cases affects the proportion of convictions and acquittals. The proportion of convictions in court trials remained exactly the same with this group of cases omitted, and the proportion of convictions in jury trials varied only a fraction of one per cent. In the rural counties the proportion of convictions was slightly smaller in both jury and judge trials with liquor cases omitted. The proportion convicted of a lesser offense, however, is somewhat larger in court trials if liquor cases are omitted.

A complete portrayal of the disposition of cases, one should state, needs to include the number of convictions of the offense charged and the number of convictions of a lesser offense. This further subdivision does not affect the results for the state as a whole. The urban and rural districts, however, show some contrast. The proportion convicted of a lesser offense in court trials in the eight large counties is much larger than the proportion convicted of a lesser offense in jury trials. The opposite situation holds true in the rural counties, where the jury is more inclined to find the accused guilty of a lesser offense than is the judge.

In Maryland the proportion of convictions in jury and non-jury trials is virtually equal. Some differences exist, however, in the results of the two types of trial in the city of Baltimore and in the counties. In the city of Baltimore the proportion of convictions is smaller, and that of acquittals greater, in court trials than in jury trials; while the returns from the counties show that the proportion of convictions is smaller in jury trials, and greater in cases tried by the court. The difference is not large, but it is possible that it may have some influence on the proportion of cases tried by the jury and by the court in the two types of jurisdiction.

The returns for Maryland as a whole show that the proportion found guilty of lesser offenses is much greater in jury than in judge trials. This situation is difficult to explain, and the results in the urban and rural districts of the state throw little light upon the matter.

IV. THE EFFECT OF WAIVER UPON CRIMINAL PROCEDURE

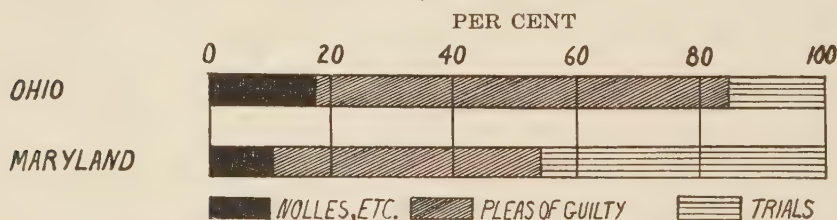
The fact that the jury is used in the majority of cases which go to trial in Ohio and that a non-jury trial is used in the majority of cases which go to trial in Maryland makes a comparison of the administration of criminal justice in the two states a matter of unusual interest. This is especially true, inasmuch as the hypothesis exists that the extensive use of non-jury trials affects the procedural outcome of cases.

Chart XV shows that the proportions of nolles and pleas of guilty are less, and the percentage of trials greater, in Maryland than in Ohio. In Maryland, 10.1 per cent of the cases are eliminated by nolles and other no-penalty dispositions; in Ohio, 17.0 per cent of the cases are thus eliminated. In Maryland, also, less than half (44.5 per cent) of the cases are dis-

posed of by pleas of guilty; in Ohio over two-thirds (67.8 per cent). On the other hand, 45.4 per cent of the cases in which indictment is returned go to trial in Maryland, while only 15.2 per cent of such cases are tried in Ohio. The extent to which the large use of non-jury trials in Maryland is responsible for this situation cannot definitely be determined. The method of trial is only one of many factors which may influence the disposition of cases in the two jurisdictions. The data, however, seem to indicate that an extensive use of non-jury trial results in increasing the number of cases which go to trial.¹¹

The actual effect of an extensive use of non-jury trial upon criminal procedure in general needs a great deal of further

CHART XV.—COMPARISON, IN PERCENTAGES, OF THE MAIN TYPES OF PROCEDURAL OUTCOME OF THE CASES FILED IN THE TRIAL COURTS OF OHIO AND MARYLAND, 1930 AND 1931



The differences between the percentages of trials and of pleas of guilty in the two states are especially marked. This contrast exists in both the urban and rural sections of these states. The percentage of nolles, however, in the rural counties of Maryland is almost as large as in the rural counties of Ohio. The absolute figures on which this chart is based are:

	Total	Nolles *	Pleas of Guilty	Trials
Ohio	18,641	3174	12,631	2836
Maryland	11,557	1172	5,143	5242

* The term "nolles," as here used, includes "No Penalty Dispositions."

¹¹ A comparison of the urban and rural sections in Maryland does not alter the situation. A large proportion (40.0 per cent) of the indictments in the rural counties and 48.2 per cent of those in Baltimore City are disposed of by trials. The number of trials, moreover, is apparently not affected to any great extent by the personnel of the officials of the court at a given time. An investigation of the records of the Criminal Court of Baltimore City revealed that in the year 1915 over forty per cent of the criminal cases actually went to trial. A similar investigation of the work of the court in 1920, 1925, and 1930 brought out that from 43.5 per cent to 48.2 per cent of the cases were disposed of by trial. It is likewise interesting to discover that the county in Ohio, in which trial by jury has been waived extensively over a period of years, has the largest proportion of trials of any county in the state.

study.¹² The practical aspect of the matter deserves consideration. The prosecuting attorney who is confronted with a crowded docket and a large number of jury trials may consider it to his own interests and to the interest of the state to secure as many pleas of guilty as possible; but if court trials may be had, the resultant rapid disposal of cases might make the prosecutor willing to allow the case to go to trial. The defendant, who pleads guilty because he feels it will enable him to secure better treatment, might really prefer to be tried by the court; and if this occurred, the case would be disposed of by judicial determination rather than by administrative discretion. The judge, who is generally regarded as the official who should decide cases, would be given that opportunity.

¹² The present discussion is purposely curtailed. The writer hopes to make a more comprehensive study of the effect of waiver upon criminal procedure in the near future.

CHAPTER IV

SUMMARY OF FINDINGS

I. THE ATTITUDE OF 109 JUDGES, 82 PROSECUTORS, AND 400 ATTORNEYS OF OHIO IN REGARD TO THE PRACTICE OF ALLOWING THE WAIVER OF JURY TRIAL

1. THE DESIRABILITY OF THE WAIVER OF JURY TRIAL

(a) In general, the great preponderance of view is to the effect that the practice of allowing the waiver of jury trial in Ohio is a desirable procedure which should be continued. An overwhelming majority, 84.2 per cent, of the total replies favor the waiver of jury trial.

(b) Three-fourths (75.2 per cent) of the judges, nearly nine-tenths (87.8 per cent) of the prosecutors, and an approximately equal number (86.0 per cent) of the attorneys favor waiver.

(c) One-seventh (13.8 per cent) of the judges, one-twentieth (4.8 per cent) of the prosecutors, and one-tenth (10.5 per cent) of the attorneys oppose waiver.

(d) The difference in the attitude of the urban and rural sections of the state on the desirability of waiver is very small.

(e) There are noticeable differences among counties in their attitudes toward waiver, but no county could be found that was entirely opposed to waiver.

(f) Those opposed to waiver are strong defenders of trial by jury and seem to fear that waiver will lead to a curtailment of the importance of the jury.

2. THE EFFECT OF WAIVER UPON THE CRITICISM OF THE BENCH

(a) In general, over two-thirds of the total replies (68.3 per cent) hold that waiver will not markedly affect the attitude toward the bench. One-fourth (25.4 per cent) think this practice will increase criticism only in rare instances. One-tenth (9.7 per cent) check that waiver has not increased criticism. One-third (33.2 per cent) check that waiver of jury trial will not result in increasing criticism.

(b) The total number in all three groups who think there is serious danger of the waiver of jury trial increasing criticism of the bench is only slightly larger than the number who think it will decrease criticism.

(c) Twenty and two-tenths per cent of the judges, 7.3 per cent of the prosecutors, and 16.0 per cent of the attorneys think there is serious danger that the waiver of jury trial will increase the criticism of the bench.

(d) Fourteen and seven-tenths per cent of the judges, 15.9 per cent of the prosecutors, and 13.2 per cent of the attorneys think that the waiver of jury trial will decrease the criticism of the bench.

(e) The judges and attorneys of the urban counties believe that the waiver of jury trial will either increase or decrease criticism to a considerable extent; the judges and attorneys of the rural counties are more inclined to indicate that waiver will not markedly affect the criticism of the bench.

(f) A large majority (70.5 per cent) of those opposed to waiver think that there is serious danger of the waiver of jury trial increasing the criticism of the bench, while only a very small number (4.1 per cent) of those who *greatly* favor waiver hold this view.

3. THE ADVISABILITY OF A CHECK UPON WAIVER

(a) The proportion (48.2 per cent) in favor of placing some limitation upon the defendant's right to waive a jury trial is almost identical with the proportion (49.3 per cent) opposed to placing any limitation upon the right to waive a jury trial.

(b) One-fourth (25.4 per cent) of the total replies favor giving the state the right to object to the waiver of jury trial; another fourth (22.8 per cent) favor giving the judge that privilege, while one-half of the replies (49.3 per cent) oppose both provisions.

(c) A considerable difference exists in the attitude of the three groups on the desirability of placing a check upon the defendant's right to waive a jury trial. Nearly two-thirds of the judges and prosecutors favor some limitation on the waiver of jury trial, while a majority of the attorneys (57.0 per cent) definitely oppose it.

(d) One-half of the prosecutors (50.0 per cent), as compared with one-fifth (20.5 per cent) of the attorneys and one-fourth (24.8 per cent) of the judges, are in favor of allowing the state the right to object to waiver. Over two-fifths of the judges (43.1 per cent), as compared with one-fifth (19.7 per cent) of the attorneys and one-ninth (11.0 per cent) of the prosecutors, are in favor of allowing the judge the right to object to waiver.

(e) The judges and attorneys of the rural counties are slightly more in favor of some type of limitation upon the defendant's right to waive a jury than are the judges and attorneys of the urban counties.

(f) The three large counties, Cuyahoga, Hamilton, and Franklin, are greatly opposed to allowing either the prosecutor or the judge the right to object to the waiver of jury trial.

(g) A large majority (67.2 per cent) of those opposed to waiver favor some limitation upon the defendant's right to waive a jury, while less than half (45.1 per cent) of those *greatly* favoring waiver hold this view.

4. THE EXTENT TO WHICH THREE JUDGES SHOULD BE USED

(a) The replies, in general, are very much in favor of allowing the trial judge assistance in the disposal of cases of major importance. A large proportion (80.4 per cent) are in favor of allowing the court the right to call in other judges to sit with him in cases involving the death penalty. Three-

fourths of the prosecutors (75.6 per cent), four-fifths of the attorneys (80.7 per cent), and a slightly larger proportion of judges (82.6 per cent) favor this provision, while a large proportion of all three groups are in favor of granting to the trial judge the privilege of calling in aid in other important cases.

5. THE FACTORS WHICH CAUSE THE WAIVER OF JURY TRIAL

(a) The reputation of the judge (his personality and disposition) is considered by a large proportion of all replies (57.7 per cent) as the most important factor affecting the waiver of jury trial. The fear of the effect of popular prejudice upon the jury, checked by 45.2 per cent of the replies, and the desire to avoid the uncertainty of the verdict of the jury, checked by 41.8 per cent, are also listed as very important factors causing waiver. The make-up and caliber of the jury panel (36.1 per cent), and the attitude of individual attorneys toward the desirability of trying cases before a judge or jury (33.8 per cent) are considered of importance. Three factors are checked in one-fourth (approximately 25.0 per cent) of the replies: the belief that a single judge will be less likely to inflict the death penalty than the jury, the hope that the sentence will be shorter if the case is tried to the court, and the desire to submit evidence favorable to the accused which might influence the sentence without securing the disfavor which might result from putting the state to the expense of a jury trial. A small number (11.7 per cent) indicate that the jury is waived because the attorney appointed by the court desires to save himself the time and bother required by a jury trial.

(b) The difference which exists on the basis of group and jurisdiction is rather small. The judges stress the importance of the attitude of the individual attorney and the belief that a single judge will be less likely to inflict the death penalty. The attorneys, on the other hand, are more inclined to emphasize the make-up and caliber of the jury panel, and the desire to submit evidence favorable to the accused which may influence the sentence without securing the disfavor which might result from putting the state to the expense of a jury trial. The prosecutors stress the fear of popular prejudice upon the jury.

6. THE TYPE OF CASES IN WHICH THE JURY IS WAIVED

(a) A large proportion (50.6 per cent) indicate that the jury is waived in the trial of cases which have aroused community anger. In two other instances there is indication that the jury is waived in cases involving prejudice: in cases in which there has been considerable newspaper comment (37.1 per cent), and in cases involving sex offenses or other revolting crimes (35.8 per cent). A somewhat larger number indicate that the jury is waived in cases in which the defendant is innocent or has a strong case while the State has a weak one (39.9 per cent) and in cases in which the defendant is seeking the advantage of a technical legal defense (37.4 per cent). Others indicate that the jury is waived in cases in which the attorneys feel that the accused is guilty but refuses to plead guilty (27.6 per cent), and in cases in which the defendant has a known bad record (26.5 per cent).

Approximately one-fourth of the replies (23.5 per cent) check that the jury is waived in cases in which the accused or his attorney are friendly with the judge or hope to bring pressure to bear.

7. THE REASONS WHY JURY TRIAL IS NOT WAIVED IN OHIO

(a) One group of replies indicates that the jury is used because it affords the defendant a greater opportunity of escaping conviction. A majority check that the jury is used because of the possibility that one or two jurors may disagree and prevent a conviction (57.7 per cent), and because a jury trial gives attorneys more opportunity to influence the verdict by stressing immaterial factors and by making emotional appeals to the sympathy and prejudice of jurors (54.8 per cent). Others list that the jury is used because laymen are easier to deceive in regard to the facts of the case than is the trial judge (43.1 per cent); because jury trial affords the defendant a better means of escaping justice (42.6 per cent), and because it is felt that a jury increases the possibility of securing an appeal and reversal through error in the admission of evidence (35.3 per cent).

(b) A second group indicates that the jury is used because it is fairer to the defendant and beneficial to society. The jury is used because of the belief that a trial before twelve laymen affords the fairest method of determining the facts and the guilt in a criminal case (31.6 per cent), and because a jury taken from different occupations brings more diversified views, experiences, and knowledge of life to the settlement of a case than does a single judge (25.9 per cent). Likewise, it is brought out that the use of the jury decreases the possibility of political control of the courts and affords protection against the possible abuse of government power and the prejudices of individual judges (31.1 per cent). An approximately equal number check that the use of the jury enables the public to share in the administration of justice and keeps the laws practical and in harmony with the convictions and mores of the people (28.4 per cent).

(c) A fairly large proportion (36.5 per cent) indicate that the jury is used because it has always been the customary method of trying criminal cases, and attorneys follow precedent without giving careful consideration to the question of which method of trial would be the better in a particular case. Finally, a small number (19.9 per cent) check that the jury is used because the attorneys of Ohio are not well informed in regard to the practice of waiving jury trial, as the statute allowing waiver has been in effect only two years.

(d) A noticeable difference exists between groups as to the factors causing the use of jury trial. The judges and prosecutors hold that the jury is used because it affords the defendant a greater opportunity of preventing a conviction; the attorneys, on the other hand, stress that the jury is used because it is fairer to the defendant and a benefit to society. Those who *greatly* favor waiver indicate that jury trial is used because it provides a better means of escaping justice, while those who oppose waiver contend that the jury is used because it is the fairest method of trial and affords the greatest amount of protection to the individual and to society.

8. THE ADVANTAGES AND DISADVANTAGES OF WAIVER

(a) A very small proportion (4.9 per cent) check that the waiver of jury trial is simply a device which makes it easier for those accused of crime to escape justice. A somewhat larger number (15.9 per cent) indicate that the opportunity given the defendant to choose the form of trial which he thinks best places the state at a disadvantage. One out of every nine (11.5 per cent) holds that a trial without a jury does not properly safeguard the larger interests of the people of the state. One out of every five (19.5 per cent) indicates that the waiver of jury trial increases the opportunity for political influence. An approximately equal proportion (18.1 per cent) check that the opportunity to waive a jury may jeopardize the rights of ignorant and indigent defendants. On the other hand, over one-third (39.9 per cent) believe that the right to waive the jury is an advantage to both the accused and society.

(b) The percentage checking the advantages of waiver is very much larger than the percentage checking the disadvantages of the practice. A large proportion of the replies emphasize that the waiver of jury trial decreases the expense involved in the trial of a criminal case (63.1 per cent), and that waiver speeds up the court and makes possible a more immediate trial of cases (60.1 per cent). A somewhat smaller number indicate that as a result of waiver the judge takes a greater part in causing the parties to bring out the vital issues of the case (56.5 per cent), and that the attorneys conduct non-jury trials in a spirit of helpfulness to the court (47.2 per cent).

(c) A fairly large proportion of the replies check that the practice of waiving a jury alters the procedure of the trial. The waiver of the jury eliminates the time taken to select the jury (50.3 per cent), the evidence is submitted in a more concise form in a non-jury case (46.7 per cent), the opening statements are omitted or greatly curtailed and the closing addresses of the attorneys are shortened (40.8 per cent); the arguments in regard to the facts involved are curtailed (39.1 per cent), the number of objections made to the admission of evidence is cut down and the amount of testimony heard is increased (36.0 per cent), and the number of appeals and reversals are less in non-jury trials (32.8 per cent).

(d) The remaining items are more general in nature. Over one-third (40.8 per cent) indicate that the waiver of the jury tends to decrease the amount of unwholesome publicity in the trial of offenses of immoral type, while a slightly smaller number (31.3 per cent) check that the right to waive a jury provides the defendant a fairer trial.

(e) The differences which exist on the basis of group and jurisdiction are quite small. Those who oppose waiver stress the disadvantages of the practice, while those who *greatly* favor waiver stress its advantages.

9. THE EXTENT TO WHICH THE JUDGE SHOULD ADVISE THE JURY

(a) One-fourth of the judges (27.0 per cent), nearly one-half of the prosecutors (45.1 per cent), and one-sixth of the attorneys (16.5 per cent) are in favor of a provision which would greatly increase the power of the trial

judge in jury cases by allowing him to give his opinion on the facts and his views on the weight of evidence and the guilt or innocence of the defendant. Three-fourths of the attorneys (74.0 per cent), one-half of the judges (52.3 per cent), and less than half of the prosecutors (45.2 per cent) oppose such a provision.

10. THE EFFECT OF WAIVER UPON THE LENGTH OF TRIALS

(a) Approximately nine-tenths (88.6 per cent) of the replies indicate that the waiver of jury trial reduces the time taken to try cases. One-sixth of the total (16.1 per cent) hold that it takes only one-third the time to try a case to the court. One-fifth (18.8 per cent) state that a trial by the court reduces the time taken by one-half. Seven and five-tenths per cent indicate that waiver reduces the time by one-fourth, while 46.2 per cent check that waiver reduces the time required to try a case but no amount can accurately be stated. A very small number (3.4 per cent) hold that waiver has no effect upon the time taken to try a case, while 1.0 per cent signify that a court trial increases the time required.

11. THE EFFECT OF WAIVER UPON THE WORK OF THE PROSECUTOR AND THE DUTIES AND RESPONSIBILITIES OF THE JUDGE

(a) One-tenth (9.8 per cent) of the prosecutors indicate that the waiver of jury trial greatly facilitates their work. A much larger proportion (40.6 per cent) reply that waiver facilitates the work of the prosecutor. One-fourth (23.2 per cent) comment that the waiver of jury trial is entirely without effect upon their work. An approximately equal number failed to answer the question.

(b) The replies of the judges show a much different situation. One-tenth (10.1 per cent) of them indicate that waiver of jury trial greatly increases the duties and responsibilities of their office. Over one-third (39.5 per cent) of the judges state that waiver increases their duties and responsibilities. One-seventh (15.6 per cent) check that waiver increases the duties and responsibilities of their office only to a small extent. One-sixth (17.4 per cent) indicate that waiver does not influence the duties of their office, while one-fifteenth (6.4 per cent) allege that waiver decreases the duties of their office.

12. THE EXTENT TO WHICH THE JUDGES OBJECT TO THE RESPONSIBILITIES OF WAIVER

(a) In general, the replies indicate that the judges of Ohio are willing to accept the duties, with the possible exception of homicide cases, which the waiver of jury trial places upon them. Only 1.0 per cent of the judges seriously object to the burden and responsibility which the waiver of jury trial involves. One-tenth (9.2 per cent) object only to the responsibility of trying homicide cases. One-fourth (27.5 per cent) indicate that they do not like the responsibility which the waiver of jury trial places upon them, but that they are willing to accept it as a part of their duty as judges. A larger proportion (42.0 per cent) check that they do not object to the additional

responsibility which results from waiver. One-twelfth of the judges (8.3 per cent) comment that the waiver of jury trial does not seem to make any difference in their work and they have no reaction toward it. One-twentieth of the total (5.5 per cent) state that they welcome the opportunity to try felony cases without a jury.

II. THE USE AND RESULTS OF THE WAIVER OF JURY TRIAL IN OHIO AND MARYLAND DURING THE YEARS 1930-1931

1. THE EXTENT TO WHICH NON-JURY TRIAL IS USED

(a) In Ohio, 17.8 per cent of all felony cases tried are without a jury, while 82.2 per cent are tried by a jury. In Maryland, 85.7 per cent of all trials are to the court, while only 14.3 per cent are jury trials.

(b) Nearly one-third of the cases in which a non-jury trial is used in Ohio are liquor cases, a large proportion of which, under the laws of the state, must be tried to the court. Thus, the jury is actually waived in only 12.0 per cent of the cases which go to trial.

(c) In 1930, 19.6 per cent of all cases in Ohio were non-jury trials; in 1931, only 16.2 per cent were tried by the court. This situation is due to a marked decrease in the number of liquor cases tried during the second year. Omitting liquor cases, actual waiver of jury trial took place in 9.5 per cent of the cases in 1930, and 14.3 per cent of the cases in 1931.

(d) If liquor cases are included, 18.8 per cent of the cases in the rural counties, as compared with only 16.7 per cent of the cases in the urban counties, are tried without a jury. If the cases in which the defendant is not entitled to a jury trial are disregarded, the situation is found to be greatly altered. The jury is waived in 15.7 per cent of the cases which go to trial in the urban counties and in only 8.1 per cent of the cases in the rural counties.

(e) The larger counties of Ohio show wide differences in the use of waiver. The range is from zero in Montgomery County to 46.1 per cent in Scioto. One-fourteenth of the trials in Lucas, one-eighth in Summit, one-sixth in Hamilton and Cuyahoga, one-fifth in Mahoning, and nearly one-third in Franklin are non-jury trials. The proportion of court trials is even greater in Stark, Butler, and Lawrence Counties, but the small number of cases makes these figures of little value. The proportion of non-jury trials is greatest in Scioto. Nearly half of all felony cases in that county are tried by the court.

(f) The various jurisdictions in Maryland show wide differences in regard to the use of jury and non-jury trial. Over nine-tenths (94.0 per cent) of all cases in Baltimore City are tried by the court, while two-thirds (66.3 per cent) of the cases in the counties are tried by the court. Nearly four-fifths (79.9 per cent) of the cases which go to trial in the five large counties are tried without a jury, as compared with only 50.8 per cent of the cases in the eighteen small counties.

(g) Baltimore County with 96.2 per cent of its cases tried without a jury has by far the largest number of court trials. Wicomico, Anne Arundel,

Washington, Frederick, Carroll, and Allegany have from fifty to seventy-five per cent of all cases tried by the court. Prince George's County, with over two-thirds (68.8 per cent), and Howard, with nearly three-fourths (75.5 per cent) of all their cases tried before juries, are virtually in a class by themselves.

2. THE TYPE OF OFFENSE IN WHICH THE JURY IS WAIVED

(a) In Ohio, a non-jury trial is used the least in murder, manslaughter, burglary and larceny cases, and the most in sex offenses, offenses against the family, and liquor cases.

(b) In Maryland, a non-jury trial is used the least in murder, manslaughter, liquor, and assault cases, and the most in burglary cases, offenses against the family, and auto theft cases.

(c) In general, the returns would seem to show that the class of offenses in which a non-jury trial is used differs from jurisdiction to jurisdiction.

3. THE NUMBER OF CONVICTIONS AND ACQUITTALS IN JURY AND NON-JURY TRIALS

(a) In Ohio, 71.8 per cent of all cases tried without a jury resulted in convictions, while only 67.7 per cent of the jury trials resulted in convictions.

(b) The number of convictions in court trials, as compared with jury trials, is especially high in the urban counties. The method of trial has much less effect upon the result in the rural districts.

(c) The proportion convicted of a lesser offense is slightly greater in court trials than in jury trials. The number convicted of a lesser offense in court trials in the eight large counties is much larger than the number convicted of a lesser offense in jury trials. In the rural counties the jury is more inclined to find the accused guilty of a lesser offense than is the judge.

(d) In Maryland, 65.1 per cent of the court cases resulted in a conviction, as compared with 65.5 per cent of the jury cases.

(e) In the city of Baltimore the number of convictions is less and the number of acquittals greater in court trials than in jury trials, while the returns from the counties show that the number of convictions is less in jury trials and greater in cases tried by the court.

(f) The proportion convicted of a lesser offense is greater in jury trials in Maryland than in court trials.

4. THE EFFECT OF WAIVER UPON CRIMINAL PROCEDURE

(a) The number of pleas of guilty is less, and the number of trials greater, in Maryland than in Ohio. In Maryland, less than half (44.5 per cent) of the cases are disposed of by pleas of guilty; in Ohio, over two-thirds of the defendants (67.8 per cent) are convicted as a result of a plea of guilty. On the other hand, 45.4 per cent of the cases which are indicted go to trial in Maryland, while only 15.2 per cent of such cases are tried in Ohio.

APPENDIX

TABLE I.—TOTAL REPLIES TO THE JURY WAIVER QUESTIONNAIRE:
BY GROUP AND BY JURISDICTION

JURISDICTION	TOTAL	Judges	Prosecutors	Attorneys	JURISDICTION	TOTAL	Judges	Prosecutors	Attorneys
TOTAL SENT....	1552	137	88	1327	Lawrence.....	6	1	1	4
TOTAL REC'D...	591	109	82	400	Licking.....	4	1	1	2
Adams.....	4	1	1	2	Logan.....	3	1	1	1
Allen.....	7	1	1	5	Lorain.....	9	2	1	6
Ashland.....	2	....	1	1	Lucas.....	28	4	1	23
Ashtabula.....	5	1	1	3	Madison.....	2	1	1	....
Athens.....	3	....	1	2	Mahoning.....	13	2	1	10
Auglaize.....	3	1	....	2	Marion.....	5	1	1	3
Belmont.....	7	1	1	5	Medina.....	3	1	1	1
Brown.....	3	1	1	1	Meigs.....	2	1	1	....
Butler.....	6	2	....	4	Mercer.....	2	1	1	....
Carroll.....	3	1	1	1	Miami.....	2	1	1	....
Champaign.....	3	1	1	1	Monroe.....	2	1	1	....
Clark.....	3	1	1	1	Montgomery..	17	4	1	12
Clermont.....	3	1	1	1	Morgan.....	3	1	1	1
Clinton.....	3	1	1	1	Morrow.....	3	1	1	1
Columbiana.....	11	1	1	9	Muskingum...	6	1	1	4
Coshocton.....	6	1	1	4	Noble.....	2	....	1	1
Crawford.....	4	1	1	2	Ottawa.....	3	1	1	1
Cuyahoga.....	62	8	1	53	Paulding.....	4	1	1	2
Darke.....	2	1	1	....	Perry.....	2	....	1	1
Defiance.....	1	1	....	....	Pickaway.....	3	1	1	1
Delaware.....	3	1	1	1	Pike.....	3	....	1	2
Erie.....	6	....	1	5	Portage.....	4	....	1	3
Fairfield.....	3	1	1	1	Preble.....	3	1	1	1
Fayette.....	2	1	1	....	Putnam.....	2	1	1	....
Franklin.....	57	5	1	51	Richland.....	4	....	1	3
Fulton.....	3	1	1	1	Ross.....	7	....	1	6
Gallia.....	2	1	1	....	Sandusky.....	4	1	1	2
Geauga.....	3	1	1	1	Scioto.....	10	1	1	8
Greene.....	6	1	1	4	Seneca.....	2	1	1	....
Guernsey.....	4	....	1	3	Shelby.....	4	1	1	2
Hamilton.....	82	8	1	73	Stark.....	13	2	1	10
Hancock.....	2	1	1	....	Summit.....	20	4	1	15
Hardin.....	2	1	1	....	Trumbull.....	9	2	1	6
Harrison.....	3	1	1	1	Tuscarawas...	2	1	....	1
Henry.....	2	1	1	....	Union.....	2	1	1	....
Highland.....	2	1	1	....	Van Wert.....	5	1	1	3
Hocking.....	2	1	1	....	Vinton.....	3	1	1	1
Holmes.....	5	1	1	3	Warren.....	4	1	1	2
Huron.....	1	1	....	....	Washington...	5	....	1	4
Jackson.....	2	1	1	....	Wayne.....	3	1	....	2
Jefferson.....	9	1	1	7	Williams.....	5	1	1	3
Knox.....	3	1	1	1	Wood.....	3	1	1	1
Lake.....	3	1	1	1	Wyandot.....	3	1	1	1

TABLE II.—DISTRIBUTION OF REPLIES TO OHIO JURY WAIVER QUESTIONNAIRE; BY QUESTION, BY GROUP, AND BY JURISDICTION

REPLY	JUDGES			PROSECUTORS			ATTORNEYS							
	Total Replies			Total State			Eight Counties			Eight Counties			Eighty Counties	
	Total State	Eight Counties	Eighty Counties	Total State	Eight Counties	Eighty Counties	Total State	Eight Counties	Eighty Counties	Total State	Eight Counties	Eighty Counties	Twenty-three Counties	Fifty-seven Counties
A. THE DESIRABILITY OF THE WAIVER OF JURY TRIAL														
GRAND TOTAL.....	591	109	37	72	82	8	74	400	247	53	73	51	70	153
Greatly Favor Waiver.....	240	35	12	23	33	7	26	172	112	27	35	18	32	60
Favor Waiver.....	258	47	16	31	39	1	38	172	104	15	33	27	29	68
Indifferent to Waiver.....	24	9	1	8	5	...	5	10	5	2	1	1	1	5
Oppose Waiver.....	34	12	6	6	2	...	2	20	12	4	4	2	2	8
Greatly Oppose Waiver.....	27	3	2	1	2	...	2	22	12	5	...	5	10	6
Failed to Reply.....	8	3	...	3	1	...	1	4	2	...	...	1	2	1
B. THE EFFECT OF WAIVER UPON THE CRITICISM OF THE BENCH														
GRAND TOTAL.....	591	109	37	72	82	8	74	400	247	53	73	51	70	153
Will Increase Criticism.....	92	22	9	13	6	...	6	64	39	8	4	13	14	25
Will Increase Criticism in Rare Instances.....	150	23	2	21	28	4	24	99	63	18	13	14	18	36
Has Not Increased Criticism.....	57	5	1	4	7	...	7	45	22	1	11	4	6	23
Will Not Increase Criticism.....	196	43	18	25	26	1	25	127	77	18	27	12	20	50
Will Decrease Criticism.....	82	16	7	9	13	2	11	53	37	4	17	5	11	16
Failed to Reply.....	14	...	...	...	2	1	1	12	9	4	1	3	1	3

REPLY

	JUDGES		PROSECUTORS		ATTORNEYS					
							EIGHT COUNTIES			
	Total State	Eight Counties	Eighty Counties	Total State	Eight Counties	Eighty Counties	Eight Counties	Franklin	Five Counties	Eighty Counties
Total Replies							Total State			

C. THE ADVISABILITY OF A CHECK UPON WAIVER

GRAND TOTAL.....	591	109	37	72	82	8	74	400	247	53	73	51	70	153	83	70
Greatly Favor Allowing Prosecutor the Right to Object to Waiver.....	65	5	1	4	18	3	15	42	19	2	3	5	9	23	13	10
Favor Allowing the Prosecutor the Right to Object to Waiver.....	85	22	7	15	23	2	21	40	19	3	6	6	4	21	11	10
Unnecessary to Allow Prosecutor the Right to Object to Waiver.....	89	16	6	10	13	...	13	60	40	9	10	9	12	20	8	12
Undesirable to Allow Prosecutor the Right to Object to Waiver.....	202	17	7	10	17	3	14	168	108	24	36	22	26	60	37	23
Favor Allowing Judge the Right to Object to Waiver.....	135	47	14	33	9	...	9	79	54	11	17	8	18	25	11	14
Failed to Reply.....	15	2	2	...	2	...	2	11	7	4	1	1	1	4	3	1

D. THE EXTENT TO WHICH THREE JUDGES SHOULD BE USED

GRAND TOTAL.....	591	109	37	72	82	8	74	400	247	53	73	51	70	153	83	70
Greatly Favor Allowing Judge Assistance in All Important Cases.....	198	34	11	23	25	3	22	139	92	16	35	12	29	47	25	22
Greatly Favor Such a Provision in Cases Involving Life Imprisonment or Death.....	69	11	2	9	7	1	6	51	27	3	10	6	8	24	18	6
Greatly Favor Such a Provision in Cases Involving the Death Penalty.....	38	10	4	6	5	...	5	23	15	4	5	2	4	8	5	3
Favor Allowing Judge Assistance in All Important Cases.....	84	11	4	7	9	...	9	64	39	7	13	5	14	25	9	16
Favor Such a Provision in Cases Involving Life Imprisonment or Death.....	48	13	2	11	9	1	8	26	13	2	2	3	6	13	12	1

TABLE II.—DISTRIBUTION OF REPLIES TO OHIO JURY WAIVER QUESTIONNAIRE; BY QUESTION, BY GROUP, AND BY JURISDICTION (Continued)

REPLY	JUDGES			PROSE- CUTORS			ATTORNEYS														
	Total State Eight Counties Eighty Counties			Total State Eight Counties Eighty Counties			Total State Eight Counties Eighty Counties					Eight Counties					Eighty Counties				
D. THE EXTENT TO WHICH THREE JUDGES SHOULD BE USED—Continued																					
Favor Such a Provision in Cases Involving the Death Penalty	38	11	4	7	7	1	6	20	10	1	3	6	..	10	..	1	9				
Such a Provision is Unnecessary	49	12	6	6	11	1	10	26	16	6	1	6	3	10	4	4	6				
Such a Provision is Undesirable	59	7	4	3	9	1	8	43	29	11	4	9	5	14	8	6	6				
No Reply	8	..	..	..	..	..	..	8	6	3	..	2	1	2	1	1	1				
E. THE FACTORS WHICH CAUSE THE WAIVER OF JURY TRIAL																					
The Attitude of the Attorney	200	54	21	33	24	3	21	122	76	17	24	13	22	46	24	22	22				
The Make-up and Caliber of the Jury Panel	213	21	5	16	23	2	21	169	98	17	33	14	34	71	39	32	32				
The Personality and Reputation of the Judge	341	67	26	41	37	5	32	237	150	34	48	26	42	87	49	38	38				
The Fear of Prejudice Upon the Jury	267	37	9	28	38	4	34	192	120	21	41	24	34	40	32	40	32				
The Fear that a Jury Trial Will Magnify the Offense	97	10	1	9	10	..	10	77	52	11	16	14	11	25	12	13	13				
The Hope that the Sentence will be Shorter	151	30	10	20	18	3	15	103	71	17	21	21	12	32	18	14	14				
The Belief that a Single Judge Will Not Inflict the Death Penalty	158	37	15	22	23	..	23	98	62	15	13	14	20	36	20	16	16				
The Desire to Avoid the Uncertainty of the Jury	247	39	10	29	28	2	26	180	111	17	37	21	36	69	40	29	29				
The Desire to Submit Evidence Without Securing the Ill Will of the Court	130	16	4	12	17	3	14	97	60	15	16	14	15	37	22	15	15				
The Appointed Attorney Desires to Save Himself Time and Bother	69	13	7	6	10	2	8	46	30	8	7	11	4	16	10	6	6				
No Reply	48	14	3	11	10	..	10	24	15	4	4	4	3	9	3	3	3				

REPLY	
TOTAL REPLIES	
JUDGES	Total State Eight Counties Eighty Counties
PROSECUTORS	Total State Eight Counties Eighty Counties
ATTORNEYS	Total State Eight Counties Eight Counties Hamilton Franklin Five Counties Eighty Counties Twenty-three Counties Fifty-seven Counties

F. THE TYPES OF CASES IN WHICH THE JURY IS WAIVED

In Cases Where the Defendant Is Innocent.....	236	49	17	32	21	3	18	166	110	29	35	17	29	56	31	25
In Cases Which Have Aroused Community Anger.....	299	40	10	30	32	3	29	227	135	25	42	24	44	92	53	39
In Cases in Which There has been Considerable Newspaper Comment.....	219	31	7	24	18	...	...	...	...	...	...	...	...	...	...	...
In Cases in Which the Defendant is a Negro.....	106	10	3	7	5	...	5	91	62	14	16	20	37	59	29	30
In Cases in Which the Defendant is Foreign Born.....	72	4	1	3	7	...	7	61	34	10	7	7	10	27	17	10
In Cases Involving Sex Offenses or Other Revolting Crimes.....	212	26	8	18	16	2	14	170	116	25	41	17	33	54	31	23
In Cases in Which the Defendant Has a Known Bad Record.....	157	25	6	19	19	2	17	113	66	13	18	16	19	47	23	24
In Doubtful Cases in Which the Accused Refuses to Plead Guilty.....	163	29	12	17	24	3	21	110	73	15	19	23	16	37	22	15
In Cases in Which the Accused is Seeking the Advantage of a Legal Defense.....	221	32	11	21	26	4	22	163	105	20	36	21	28	58	29	29
In Cases in Which the Evidence is Long and Complicated.....	88	9	1	8	6	...	6	73	45	9	14	9	13	28	17	11
In Cases in Which the Accused or His Attorney are Friendly With the Judge.....	139	17	8	9	14	3	11	108	63	18	11	13	21	45	24	21
No Reply.....	84	27	9	18	20	1	19	37	22	4	6	7	5	15	9	6

WAIVER OF JURY IN CRIMINAL CASES

TABLE II.—DISTRIBUTION OF REPLIES TO OHIO JURY WAIVER QUESTIONNAIRE; BY QUESTION, BY GROUP, AND BY JURISDICTION (Continued)

REPLY	G. THE FACTORS WHICH CAUSE THE USE OF JURY TRIAL															
	JUDGES			PROSE- CUTORS			ATTORNEYS									
	Total State	Eight Counties	Eighty Counties	Total State	Eight Counties	Eighty Counties	Total State	Eight Counties	Eighty Counties	Franklin	Hamilton	Cuyahoga	Five Counties	Twenty-three Counties	Fifty-seven Counties	
TOTAL REPLIES																
The Jury Affords the Defendant a Better Means of Escaping Justice	252	60	19	41	46	5	41	146	81	17	27	7	30	65	35	30
The Jury Enables Attorneys to Influence the Verdict by Stressing Immaterial Factors	324	69	22	47	53	5	48	202	122	26	43	14	39	80	44	36
A Jury Trial Increases the Possibility of Securing a Reversal on Error	209	44	15	29	37	2	35	128	73	19	23	7	24	55	29	26
The Jury is Used Because of the Hope that One or Two Jurors will Disagree	341	77	25	52	60	6	54	204	125	25	47	14	39	79	47	32
It is Easier to Deceive Laymen Than a Trial Judge	255	61	19	42	44	5	39	150	93	19	33	9	32	57	32	25
Judges Dislike and Tend to Discourage the Waiver of Jury in Felony Cases	114	18	3	15	16	1	16	80	47	10	7	9	21	33	16	17
The Jury Has Always Been the Customary Method of Trial	216	47	17	30	21	2	19	148	90	19	33	16	22	58	32	26
The Attorneys of Ohio are Not Well Informed in Regard to Waiver	117	27	8	19	14	2	12	76	41	6	15	5	15	35	20	15
Twelve Laymen Afford the Fairest Method of Determining Guilt	187	30	10	20	11	1	11	146	102	20	27	26	29	44	22	22
The Experiences of Twelve Men are Greater and Broader Than Those of One Man	153	24	9	15	5	5	5	124	88	25	19	19	25	36	22	14
The Jury Enables the Law to be Applied in Such a Manner as Will Give Justice	75	11	3	8	2	2	2	62	41	10	10	10	11	21	10	11

REPLY

JUDGES		PROSECUTORS		ATTORNEYS	
Total State	Eight Counties	Eighty Counties	Total State	Eight Counties	Eighty Counties
Eight Counties				Franklin	
				Hamilton	
				Cuyahoga	
				Eight Counties	
					Five Counties
					Eighty Counties
					Twenty-three Counties
					Fifty-seven Counties
Total Replies					

G. THE FACTORS WHICH CAUSE THE USE OF JURY TRIAL—Continued

Jury Trial Relieves the Judge of a Burden and Protects Him from Criticism.....	146	26	5	21	16	...	16	104	72	17	21	15	19	32	16	16
Jury Trial Affords Protection Against Political Influence and the Abuse of Power.....	184	29	12	17	13	1	12	142	95	25	18	23	29	47	23	24
The Jury Enables the Public to Share in the Administration of Justice.....	168	28	9	19	17	...	17	123	83	18	21	21	23	40	21	19
No View Expressed.....	52	9	3	6	9	1	8	34	23	4	7	9	3	11	5	6

H. THE ADVANTAGES AND DISADVANTAGES OF WAIVER

Waiver Makes it Easier for the Defendant to Escape Justice.....	29	11	6	5	.....	18	11	2	3	4	2	7	3	4
Waiver Increases the Opportunity for Political Pressure to be Brought to Bear.....	115	16	6	10	13	2	11	86	56	18	7	13	18	30
The Waiver of the Jury Places the State at a Disadvantage.....	94	12	3	9	20	4	16	62	40	10	12	5	13	22
Non-Jury Trial Does Not Properly Safeguard the Interests of the People.....	68	15	5	10	4	....	4	49	32	7	5	9	11	17
Waiver is of No Particular Advantage or Disadvantage to the State.....	178	22	8	14	17	2	15	139	89	18	36	15	20	50
Waiver May Jeopardize the Rights of Ignorant and Indigent Defendants.....	107	14	5	9	6	1	5	87	59	17	10	15	17	28

WAIVER OF JURY IN CRIMINAL CASES

TABLE II.—DISTRIBUTION OF REPLIES TO OHIO JURY WAIVER QUESTIONNAIRE; BY QUESTION, BY GROUP, AND BY JURISDICTION (Continued)

REPLY	ATTORNEYS															
	JUDGES			PROSECUTORS			EIGHT COUNTIES					EIGHTY COUNTIES				
	Total State			Eight Counties			Eighty Counties			Total State						
	Eight Counties	Eighty Counties	Total State	Eight Counties	Eighty Counties	Total State	Eight Counties	Cuyahoga	Hamilton	Franklin	Five Counties	Eighty-three Counties	Fifty-seven Counties			
H. THE ADVANTAGES AND DISADVANTAGES OF WAIVER—Continued																
Waiver is an Advantage to Both the Accused and to Society	236	26	9	17	32	3	29	178	118	24	38	20	36	60	34	26
Waiver Enables the Accused to Have a Fairer Trial	185	27	10	17	19	2	17	139	90	16	33	13	28	49	28	21
Non-Jury Trial Makes Possible a More Immediate Trial of Cases	355	58	20	38	46	6	40	251	154	32	50	26	46	97	57	40
Non-Jury Trial Decreases the Expense Involved in the Trial of Cases	373	58	21	37	54	6	48	261	166	35	53	30	48	95	56	39
Non-Jury Trial Decreases the Amount of Unwholesome Publicity	241	32	7	25	31	3	28	178	115	24	40	18	33	63	34	29
Waiver Decreases the Amount of Jury Service and Increases its Importance	97	12	2	10	8	2	6	77	52	11	13	8	20	25	18	7
Waiver Eliminates the Time Taken to Select the Jury	297	51	17	34	44	7	37	202	133	30	44	25	34	69	42	27
In Non-Jury Trials Opening Statements and Closing Addresses Are Curtailed	241	36	14	22	38	7	31	167	110	25	42	22	21	57	35	22
The Evidence is Submitted in a More Concise Form	276	49	19	30	44	8	36	183	124	31	37	23	33	59	35	24
The Number of Objections to Evidence is Decreased	213	32	14	18	27	7	20	154	98	18	36	19	25	56	32	24
The Arguments as to the Facts Involved are Curtailed	231	44	18	26	30	3	27	157	106	22	38	19	27	51	33	18
The Number of Appeals and Reversals are Decreased	190	30	11	19	26	4	22	134	88	24	27	8	29	46	26	20
Attorneys Conduct Non-Jury Trials in a Spirit of Helpfulness to the Court	279	46	15	31	37	4	33	196	131	28	42	27	34	65	38	27
The Judge Takes a Greater Part in Bringing out the Vital Issues of the Case	334	56	18	38	43	6	37	235	152	29	51	29	43	83	49	34
No View Expressed	46	19	9	10	9	9	9	28	16	3	4	5	4	12	6	6

H. THE ADVANTAGES AND DISADVANTAGES OF WAIVER—Continued

REPLY

I. THE EFFECT OF WAIVER UPON THE LENGTH OF TRIALS

	JUDGES			PROSECUTORS			ATTORNEYS					
	Total State	Eight Counties	Eighty Counties	Total State	Eight Counties	Eighty Counties	Total State	Eight Counties	Eighty Counties	Eighty-three Counties	Twenty-three Counties	Fifty-seven Counties
TOTAL REPLIES												

GRAND TOTAL	591	109	37	72	82	8	74	400	247	53	73	51	70	153	83	70
Requires Only One-Third the Time to Try a Non-Jury Case	95	17	6	11	14	2	12	64	40	10	14	9	7	24	12	12
Requires Only One-Half the Time to Try a Non-Jury Case	111	23	8	15	11	1	10	77	51	9	13	8	21	26	14	12
A Non-Jury Trial Reduces the Time by One Fourth	44	9	2	7	5	2	3	30	21	5	6	3	7	9	5	4
A Non-Jury Trial Reduces the Time but No Amount can Definitely be Stated	273	51	15	36	38	3	35	184	114	26	35	26	27	70	39	31
A Non-Jury Trial Has No Effect on the Time Required	20	1	1	...	2	...	1	7	...	2	1	1	4	10	6	4
A Non-Jury Trial Increases the Time Required	4	1	1	...	1	...	2	2	...	...	1	1	...	...	...	...
No View Expressed	44	7	4	3	11	...	11	26	12	3	2	3	4	14	7	7

J. THE EXTENT TO WHICH THE JUDGE SHOULD ADVISE THE JURY

GRAND TOTAL	591	109	37	72	82	8	74	400	247	53	73	51	70	153	83	70
Greatly Favor Allowing the Judge to Advise the Jury	70	10	6	4	22	4	18	38	26	7	9	5	5	12	6	6
Favor Allowing the Judge to Advise the Jury	63	20	8	12	15	...	15	28	15	1	6	3	5	13	8	5
Indifferent About the Practice	53	17	7	10	7	...	7	29	17	2	5	6	4	12	4	8
Oppose Allowing the Judge to Advise the Jury	172	43	12	31	24	3	21	105	62	14	18	14	16	43	19	24
Greatly Oppose Allowing the Judge to Advise the Jury	218	14	2	12	13	1	12	191	121	28	33	22	38	70	44	26
No View Expressed	15	5	2	3	1	...	1	9	6	1	2	1	2	3	2	1

